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19	20	p. 76	p. 786
19	21	*Pckenham Case*	*Pakenham's Case*
43	15	..	Should read " s. 41 of the Law of Property Act, 1925 (2), is "
143	14	" sheriff "	" bailiff "
275	footnote (10)	[1910] 1 Ch. 578	[1901] 1 Ch. 578
376	7	" for the tenant for life "	" for a tenant for life of a share of the income (who was also entitled in remainder to the ultimate capital) arising from the proceeds of sale of the real estate of the testator "

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Abrahams, Stening *v.* – – 470
Associated Furnishers, Ld., Simons *v.* – – – – 379
Attorney-General, Jackson *v.* In re Cockell – (C. A.) 389
———— Knapman *v.* In re Stratton – (C. A.) 197
———— *v.* Manchester Corporation – – – 254
———— *v.* Sharp (C. A.) 121

B.

Bell, Lock *v.* – – – – 35
Berliner, T. M. Fairclough & Sons, Ld. *v.* – – – 60
Birmingham (Bishop of), Notley *v.* – – – – – – 529
Bishop of Birmingham, Notley *v.* – – – – – – 529
Bomze and Lederman *v.* Bomze. In re Lloyds Bank – – 289
Bradbury, Hilton *v.* In re Tong (C. A.) 202
Broadhurst, Delavenne *v.* – 234

C.

Carr *v.* Forrest. In re Forrest – 162
Chatsworth Estates Co. *v.* Fewell 224

PAGE

Clark *v.* Littlewood. In re Littlewood – – – – 443
Cockell, In re. Jackson *v.* Attorney-General (C. A.) 389
Corsini, Terroni and Necchi *v.* – 515
Cox *v.* Kilsby. In re Pitts – 546
Cugny's Will Trusts, In re. Smith *v.* Freeman – – 305
Cusack-Smith, Jones *v.* In re Jones – – – – 375

D.

Dale, In re. Mayer *v.* Wood – 357
Davies, Watson *v.* – – – 455
Delavenne *v.* Broadhurst – 234

E.

Edmondson, Grant *v.* (C. A.) 1

F.

Fairclough (T. M.) & Sons, Ld. *v.* Berliner – – – – 60
Famous Lasky Film Service, Ld., Frankenburg *v.* (C. A.) 428
Fenton, In re. Ex parte Fenton Textile Association, Ld. (C. A.) 85

PAGE

Fenton Textile Association, Ld., Ex parte. In re Fenton (C. A.) 85
Fewell, Chatsworth Estates Co. *v.* 224
Fladgate *v.* Gore. In re Vander Byl 216
Forrest, Carr *v.* In re Forrest 162
Forrest, In re. Carr *v.* Forrest 162
Frankenburg *v.* Famous Lasky Film Service, Ld. (C. A.) 428
Freeman, Smith *v.* In re Cugny's Will Trusts 305

G.

Gore, Fladgate *v.* In re Vander Byl 216
Granger *v.* South Wales Electrical Power Distribution Co. 551
Grant *v.* Edmondson (C. A.) 1

H.

H. Ridehalgh & Son, Ld., Sagar *v.* (C. A.) 310
Hammond *v.* London County Council 540
Harris, In re 138
Hilton *v.* Bradbury. In re Tong (C. A.) 202
Hood, In re. Public Trustee *v.* Hood (C. A.) 240
——— Public Trustee *v.* In re Hood (C. A.) 240
Hulton, In re. Hulton *v.* Midland Bank Executor and Trustee Co., Ld. 77
——— *v.* Midland Bank Executor and Trustee Co., Ld. In re Hulton 77
Huxtable, Lawrence *v.* In re Phillips 347

J.

Jackson *v.* Attorney-General. In re Cockell (C. A.) 389
Jones, In re. Jones *v.* Cusack-Smith 375

PAGE

Jones *v.* Cusack-Smith. In re Jones 375
Judkin, Parker *v.* (C. A.) 475

K.

Kilsby, Cox *v.* In re Pitts 546
Knapman *v.* Attorney-General. In re Stratton (C. A.) 197

L.

Lawrence *v.* Huxtable. In re Phillips 347
Littlewood, Clark *v.* In re Littlewood 443
——— In re. Clark *v.* Littlewood 443
Lloyds Bank, Ld., In re. Bomze and Lederman *v.* Bomze 289
Lock *v.* Bell 35
London County Council, Hammond *v.* 540

M.

Manchester Corporation, Attorney-General *v.* 254
Mayer *v.* Wood. In re Dale 357
Midland Bank Executor and Trustee Co., Ld., Hulton *v.* In re Hulton 77
Miller and Pickersgill's Contract, In re 511

N.

National Benefit Assurance Co., Ld., In re 46
North Charterland Exploration Co. (1910) Ld. *v.* The King 169
Notley *v.* Bishop of Birmingham 529

P.

Parker *v.* Judkin (C. A.) 475

PAGE

Phillips, In re. Lawrence *v.* Huxtable – – – – 347
Pitts, In re. Cox *v.* Kilsby – 546
Pretyman *v.* Pretyman. In re Tomline's Will Trusts – – 521
Previtè, In re. Sturges *v.* Previtè – – – – 447
——— Sturges *v.* In re Previtè 447
Public Trustee *v.* Hood. In re Hood – – (C. A.) 240

R.

Rex, North Charterland Exploration Co. (1910) Ld. *v.* – 169
Ridehalgh (H.) & Son, Ld., Sagar *v.* – – (C. A.) 310

S.

Sagar *v.* H. Ridehalgh & Son, Ld. – – – (C. A.) 310
Sharp, Attorney-General *v.* (C. A.) – – – – 121
Simons *v.* Associated Furnishers, Ld. – – – – – 379
Smith *v.* Freeman. In re Cugny's Will Trusts – – 305
South London Greyhound Racecourses, Ld. *v.* Wake – – 496
South Wales Electrical Power Distribution Co., Granger *v.* – 551
Stening *v.* Abrahams – – 470
Stephens, Vickery *v.* In re Vickery – – – – 572
Stratton, In re. Knapman *v.* Attorney-General (C. A.) 197
Sturges *v.* Previtè. In re Previtè 447

T.

T. M. Fairclough & Sons, Ld. *v.* Berliner – – – – 60
Terroni and Necchi *v.* Corsini – 515

PAGE

Tomline's Will Trusts, In re. Pretyman *v.* Pretyman – 521
Tong, In re. Hilton *v.* Bradbury (C. A.) 202
Trimble, In re. Wilson *v.* Turton – – – – 369
Tuely, Wimbledon and Putney Commons Conservators *v.* – 190
Turton, Wilson *v.* In re Trimble 369

V.

Vander Byl, In re. Fladgate *v.* Gore – – – – – 216
Vickery, In re. Vickery *v.* Stephens – – – – 572
——— *v.* Stephens. In re Vickery – – – – 572

W.

Wake, South London Greyhound Racecourses, Ld. *v.* – – 496
Walker & Homfrays, Ld., Walton Harvey, Ld. *v.* – 145
——— *v.* ——— (C. A.) 274
Walton Harvey, Ld. *v.* Walker & Homfrays, Ld. – – 145
——— *v.* ——— (C. A.) 274
Watson *v.* Davies – – – 455
Western Electric Co., Ld.'s Patent – – – – 68
Whitehead, Windermere District Gas and Water Co. *v.* – – 558
Wilson *v.* Turton. In re Trimble 369
Wimbledon and Putney Commons Conservators *v.* Tuely – 190
Windermere District Gas and Water Co. *v.* Whitehead – 558
Wood, Mayer *v.* In re Dale – 357

TABLE OF CASES CITED.

A.

		PAGE
Abrahams *v.* MacFisheries, Ld	[1925] 2 K. B. 18	473
Achilli *v.* Tovell	[1927] 2 Ch. 243	228
Allsop, In re	[1914] 1 Ch. 1	580
Ambler, In re	[1905] 1 Ch. 697	403
Archer *v.* James	2 B. & S. 61; 31 L. J. (Q. B.) 153	317
Ascherson *v.* Tredegar Dry Dock and Wharf Company	[1909] 2 Ch. 401	105
Ashbury Railway Carriage and Iron Company *v.* Riche	L. R. 7 H. L. 653	194, 569
Atkinson, In re	[1930] 1 Ch. 47	443
——— *v.* Ritchie	10 East, 530	154
Attenborough *v.* Solomon	[1913] A. C. 76	489
Attorney-General *v.* Ashborne Recreation Ground Company	[1903] 1 Ch. 101	125
——— *v.* Bradford Corporation	75 J. P. 553	264
——— *v.* City of London	1 Ves. Jr. 243	242
——— *v.* Dale	Unreported (decided Oct. 17, 1928)	125
——— *v.* De Keyser's Royal Hotel	[1920] A. C. 508	178, 406
——— *v.* Ely, Haddenham and Sutton Railway Company	L. R. 4 Ch. 194	127
——— *v.* Hanwell Urban District Council	[1900] 2 Ch. 377	254
——— *v.* Horner	14 Q. B. D. 245	183
——— *v.* London (City of)	1 Ves. Jr. 243	242
——— *v.* Manchester Corporation	[1906] 1 Ch. 643	263, 264
——— *v.* Merthyr Tydfil Union	[1900] 1 Ch. 516	127
——— *v.* Oxford, Worcester and Wolverhampton Railway Company	2 W. R. 330	134
——— *v.* Shrewsbury (Kingsland) Bridge Company	21 Ch. D. 752	125
——— *v.* Stepney	10 Ves. 22	242
——— *v.* Sunderland Corporation	2 Ch. D. 634	263
——— *v.* ——— ———	[1929] 2 Ch. 436; [1930] 1 Ch. 168	263
——— *v.* Teddington Urban District Council	[1898] 1 Ch. 66	265
——— *v.* Wimbledon House Estate Company	[1904] 2 Ch. 34	126
Auckland Harbour Board *v.* The King	[1924] A. C. 318	183
Austerberry *v.* Oldham Corporation	29 Ch. D. 750	6

B.

		PAGE
Bahia and San Francisco Railway Company, In re	L. R. 3 Q. B. 584	503
Baily *v.* De Crespigny	L. R. 4 Q. B. 180	145, 274
Bain, In re	[1930] 1 Ch. 224	197
Balkis Consolidated Company *v.* Tomkinson	[1893] A. C. 396	502
Bally *v.* Wells	Wilmot, 341; 3 Wils. 25	1
Bank of Montreal *v.* Stuart	[1911] A. C. 120	291
Barclay, In re	[1929] 2 Ch. 173	197
Barned's Banking Company, In re	L. R. 3 Ch. 105	502
Barratt, In re	31 Times L. R. 502	521
Barrett, Ex parte	13 W. R. 559; 34 L. J. (Bank.) 41	98
Barrow Mutual Ship Insurance Company *v.* Ashburner	54 L. J. (Q. B.) 377	53
Basten *v.* Butter	7 East, 479	315
Bastin *v.* Bidwell	18 Ch. D. 238	382
Bates, In re	[1925] Ch. 157	78
Bedford (Duke of) *v.* British Museum Trustees	2 My. & K. 552	227
Belham, In re	[1901] 2 Ch. 52	402
Bellyse *v.* M'Ginn	[1891] 2 Q. B. 227	141
Bensley *v.* Bignold	5 B. & Ald. 335	47
Birch *v.* Cropper	14 App. Cas. 525	569
Blackburn Bobbin Company *v.* T. W. Allen & Sons	[1918] 1 K. B. 540	151
Blackpool Motor Car Company, In re	[1901] 1 Ch. 77	93
Blount *v.* Layard	[1891] 2 Ch. 681*n.*	228
Bolton Partners *v.* Lambert	41 Ch. D. 295	455
Bonham, In re	10 Ch. D. 595	405
Bow, McLachlan & Co. *v.* Ship "Camosun"	[1909] A. C. 597	315, 316
Bowles *v.* Attorney-General	[1912] 1 Ch. 123	80
Bowman *v.* Secular Society, Ld.	[1917] A. C. 406	242
Bowring, In re	34 Times L. R. 575	77
Boxer, In re	[1910] 2 Ch. 69	78
Boyd, In re	[1897] 2 Ch. 232	220
Boyers & Co. *v.* D. & R. Duke	[1905] 2 Ir. R. 617	466
Bradley *v.* Walsh	88 L. T. 737	35
Brady *v.* Cubit	1 Doug. 31	450
Brewster *v.* Kidgill (Kitchin or Kitchel)	12 Mod. 166; 1 Ld. Raym. 317; Holt, 175	1, 7, 14
Bridgett and Hayes' Contract, In re	[1928] Ch. 163	308
Brier, In re	26 Ch. D. 238	580
Brightman & Co., Ld. *v.* Tate	[1919] 1 K. B. 463	47
Bright's Trustee *v.* Sellar	[1904] 1 Ch. 369	440
British Farmers' Pure Linseed Cake Company, In re	7 Ch. D. 533	503
British Thomson Houston Company, Ld.'s, Patent, In re	46 R. P. C. 367	77
Brown *v.* Davis	Unreported	323
Bruce *v.* Lord Ponsonby	[1844] 7 I. L. R. 414	19
Burch *v.* Farrows Bank, Ld.	[1917] 1 Ch. 606	382
Burkinshaw *v.* Nicolls	3 App. Cas. 1004	503
Butler *v.* Archer	(1860) 12 Ir. C. L. R. 104	8
Byron's Settlement, In re	[1891] 3 Ch. 474	350

C.

		PAGE
Callander *v.* Howard	10 C. B. 290	53
Campbell *v.* Hall	1 Cowp. 204	169
Canham *v.* Rust	8 Taunt. 227	12
Carpenter's Estate	50 Am. St. Rep. 765	549
Caton *v.* Rideout	1 Mac. & G. 599	291
Chapel *v.* Higgs	3 L. J. (Ex.) 38	317
Chaplin *v.* Smith	[1926] 1 K. B. 198	473
Charlesworth, In re	[1910] W. N. 18	199
Chawner *v.* Cummings	8 Q. B. 311	310
Cheslyn *v.* Cresswell	3 Bro. P. C. 246; 2 Eden, 123	166*n.*
City Equitable Fire Insurance Company, In re	[1925] Ch. 407	572
City Life Assurance Company, In re	[1926] Ch. 191	100
Clarke, In re	[1923] 2 Ch. 407	241
Cleaver *v.* Mutual Reserve Fund Life Association	[1892] 1 Q. B. 147	546
Cobbett *v.* Brock	20 Beav. 524	289
Collaroy Company *v.* Giffard	[1928] Ch. 144	569
Colyer *v.* Finch	5 H. L. C. 905	482
Commissioner of Public Works (Cape Colony) *v.* Logan	[1903] A. C. 355	181
Commissioners for Special Purposes of Income Tax *v.* Pemsel	[1891] A. C. 531	249
Cooke *v.* Chilcott	3 Ch. D. 694	24
Cooper *v.* Emery	1 Ph. 388	513
——— *v.* Whittingham	15 Ch. D. 501	125
Cope *v.* Rowlands	2 M. & W. 149	47
Corser *v.* Cartwright	L. R. 7 H. L. 731	476
Coslake *v.* Till	1 Russ. 376	35
Crawshay, In re	[1915] W. N. 412	78
Cresswell *v.* Cheslyn	2 Eden, 123; 3 Bro. P. C. 246	166
Crippen, In the Estate of	[1911] P. 108	548
Crosse, In re	[1920] 1 Ch. 240	78
Cunningham *v.* Foot	3 App. Cas. 974	481
Cuno, In re	43 Ch. D. 12	271
Curtis *v.* Wainbrook Iron Company	Cab. & E. 351	140
Cyclists' Touring Club *v.* Hopkinson	[1910] 1 Ch. 179	190

D.

Daintrey, In re	[1900] 1 Q. B. 546	97
Dakin & Co., Ld. *v.* Lee	[1916] 1 K. B. 566	316
D'Arcy *v.* Tamar Kit Hill and Callington Railway Company	L. R. 2 Ex. 158	504
Davies *v.* Parry	[1899] 1 Ch. 602	402
Davies' Trusts, In re	L. R. 13 Eq. 163	216
Davis *v.* Hedges	L. R. 6 Q. B. 687	316
De Clifford's (Lord) Estate, In re	[1900] 2 Ch. 707	580
Dendy *v.* Evans	[1910] 1 K. B. 263	66
Devonald *v.* Rosser & Sons	[1906] 2 K. B. 728	338
Devonport Corporation *v.* Tozer	[1903] 1 Ch. 759	126
Dewar *v.* Goodman	[1909] A. C. 72	6
Dilke, In re	[1921] 1 Ch. 34	349
Discoveries Finance Corporation, Ld., In re	[1910] 1 Ch. 312	237

		PAGE
Dixon *v.* Kennaway & Company	[1900] 1 Ch. 833	504
Dominion Coal Company *v.* Maskinonge Steamship Company	[1922] 2 K. B. 132	152
D'Oyly, In re	[1917] 1 Ch. 556	372
Duff Development Company *v.* Government of Kelantan	[1924] A. C. 797	178
Dumble, In re	23 Ch. D. 360	220
Dunne *v.* Byrne	[1912] A. C. 407	197, 241
Dunn's Trustees *v.* Dunn	1924 S. C. 613	317
Dyson *v.* Forster	[1909] A. C. 98	5*n*.

E.

Eades, In re	[1920] 2 Ch. 353	245
Eberle's Hotels and Restaurant Company *v.* Jonas	18 Q. B. D. 459	97
Edwards *v.* Salmon	23 Q. B. D. 531	194
Egremont (Earl of) *v.* Keene	2 Jones (Exch. Ir.), 307	9
Eland *v.* Baker	29 Beav. 137	350
Ellard *v.* Phelan	[1914] 1 I. R. 76	450
Elliston *v.* Reacher	[1908] 2 Ch. 374, 665	228
English Insurance Company *v.* National Benefit Assurance Company	[1929] A. C. 114	55
Evans (Joseph) & Company *v.* Heathcote	[1918] 1 K. B. 418	52
Exeter (Bishop of) *v.* Marshall	L. R. 3 H. L. 17	533

F.

F. A. Tamplin Steamship Company, Ld. *v.* Anglo-Mexican Petroleum Products Company, Ld.	[1916] 2 A. C. 397	150
Fane, In re	[1913] 1 Ch. 404	349
Farnsworth *v.* Garrard	1 Camp. 38	310
Farrar *v.* Farrars, Ld.	40 Ch. D. 395	482
Featherstone's Trusts, In re	22 Ch. D. 111	361
Feilden *v.* Byrne	[1926] Ch. 620	228
Felstead *v.* The King	[1914] A. C. 534	550
Fenwick, In re	[1922] 2 Ch. 775	372
Figg *v.* Moore Brothers	[1894] 2 Q. B. 690	141
Finch *v.* Underwood	2 Ch. D. 310	382
First Russian Insurance Company *v.* London and Lancashire Insurance Company	[1928] Ch. 922	151
Flavell, In re	25 Ch. D. 89	485
Folkestone Corporation *v.* Brockman	[1914] A. C. 338	254, 264
Food Controller *v.* Cork	[1923] A. C. 647	406
Foster *v.* Elvet Colliery Company	[1908] 1 K. B. 629	2
Foveaux, In re	[1895] 2 Ch. 501	242
Frank Warr & Company, Ld. *v.* London County Council	[1904] 1 K. B. 713	150, 275, 473
Fraser, In re	[1904] 1 Ch. 726	165
Furze and Venn's Contract, In re	[1894] 2 Ch. 101	484

G.

		PAGE
Garrard, In re	[1907] 1 Ch. 382	198
Gasquoine, In re	[1894] 1 Ch. 470	580
German *v.* Chapman	7 Ch. D. 271	227
Gibson *v.* Bell	1 Bing. (N. C.) 743	99
Gilbert, In re	[1898] 1 Q. B. 282	392
Graigola Merthyr Company, Ld. *v.* Swansea Corporation	[1927] W. N. 30	429
Grand Junction Canal Company *v.* Petty	21 Q. B. D. 273	264
Grange *v.* Denny	3 Bulstr. 174	534
Grey *v.* Friar	4 H. L. C. 565	379
Grissell *v.* Bristowe	L. R. 4 C. P. 36	321
Gwyn *v.* Neath Canal Navigation Company	L. R. 3 Ex. 209	6

H.

Hall, In the Estate of	[1914] P. 1	549
Hammersmith, &c., Railway Company *v.* Brand	4 H. L. 171	178
Harper, In re	[1914] 1 Ch. 70	361
Harris, In re	[1914] 2 Ch. 395	402
Harrison Brothers & Co. and Shipton, Anderson & Co.'s Arbitration, In re	[1915] 3 K. B. 676	151, 275
Harse *v.* Pearl Life Assurance Company	[1904] 1 K. B. 558	58
Hart *v.* Frontino, &c., Gold Mining Company	L. R. 5 Ex. 111	502
—— *v.* Riversdale Mill Company	[1927] 1 K. B. 624; [1928] 1 K. B. 176	310, 329
Harvey *v.* Facey	[1923] A. C. 552	466
Hawes *v.* Hawes	14 Ch. D. 614	361
Haywood *v.* Brunswick Building Society	8 Q. B. D. 403	6
Heard *v.* Stuart	24 Times L. R. 104	472
Henderson *v.* Bank of Australasia	40 Ch. D. 170	193
Henson, In re	[1908] 2 Ch. 356	476
Herepath & Delmar, In re	7 Morr. 129	93
Hewlett *v.* Allen	[1894] A. C. 383	194
———— *v.* Allen & Sons	[1892] 2 Q. B. 662	327
Heywood, In re	[1897] 2 Ch. 593	405
Hindley *v.* Haslam	3 Q. B. D. 481	316
Hodge *v.* Churchward	16 Sim. 71	481
Holman *v.* Johnson	1 Cowp. 341	58
Home and Colonial Insurance Company, In re	[1930] 1 Ch. 102	52
Home and Foreign Investment and Agency Company	[1912] 1 Ch. 72	569
Horlock *v.* Beal	[1916] 1 A. C. 486	155
Houghton, In re	[1915] 2 Ch. 173	546
Houghton & Company *v.* Nothard, Lowe & Wills	[1927] 1 K. B. 246	505
House, In re	[1929] 2 Ch. 166	377
Houston *v.* Burns	[1918] A. C. 337	199
Howes *v.* Bishop	[1909] 2 K. B. 390	289
Hudson, In re	[1911] 1 Ch. 206	450
Hughes *v.* Lenny	5 M. & W. 183	316

		PAGE
Huguenin *v.* Baseley	14 Ves. 273	289
Hunter *v.* Attorney-General	[1899] A. C. 309	245
Hurst *v.* Picture Theatres, Ld.	[1915] 1 K. B. 1	151
Husey *v.* London Electric Supply Corporation	[1902] 1 Ch. 411	554

I.

Ickeringill's Estate, In re	17 Ch. D. 151	220
Inland Revenue Commissioners *v.* Falkirk Temperance Café Trust	1927 S. C. 261	242
—— *v.* Temperance Council of Christian Churches of England and Wales	136 L. T. 27	240
Institute of Patent Agents *v.* Lockwood	[1894] A. C. 347	126

J.

Jack *v.* Kipping	9 Q. B. D. 113	99
Jackson *v.* Simons	[1923] 1 Ch. 373	472, 473*n.*
James Jones & Sons, Ld. *v.* Tankerville (Earl)	[1909] 2 Ch. 440	151, 275
Jones, In re	31 Ch. D. 440	419
—— (James) & Sons, Ld. *v.* Tankerville (Earl)	[1909] 2 Ch. 440	151
Joseph Evans & Co. *v.* Heathcote	[1918] 1 K. B. 418	52
Joyner *v.* Weeks	[1891] 2 Q. B. 31	515

K.

Kay, In re	[1897] 2 Ch. 518	580
Kearley *v.* Thomson	24 Q. B. D. 742	47
Keates *v.* Lewis Merthyr Consolidated Collieries, Ld.	[1910] 2 K. B. 445; [1911] A. C. 641	316
Kelsey *v.* Dodd	52 L. J. (Ch.) 34	9
Kelly *v.* Barrett	[1924] 2 Ch. 379	228
Kempthorne, In re	[1930] 1 Ch. 268	204, 443
Kennedy *v.* Stewart	7 I. L. R. 421*n.*	8
King *v.* David Allen & Sons, Billposting, Ld.	[1916] 2 A. C. 54	149, 473
Knight *v.* Simmonds	[1896] 1 Ch. 653; [1896] 2 Ch. 294	227
Kreditbank Cassel G.m.b.H. *v.* Schenkers, Ld.	[1927] 1 K. B. 826	505

L.

Laidlaw, In re	[1930] W. N. 206; since reported [1930] 2 Ch. 392	371
Lamb, In re	[1929] 1 Ch. 722	202
Lassells *v.* Lord Cornwallis	2 Vern. 465	352
Latter *v.* Juckes	[1927] 1 K. B. 17	140

		PAGE
Laycock, In re	[1919] 1 Ch. 241	391
Lea, In re	34 Ch. D. 528	242
Learoyd *v.* Whiteley	12 App. Cas. 727	572
Lee *v.* Nuttall	12 Ch. D. 61	417
Lee and Chapman's Case	30 Ch. D. 216	113
Leeds City Brewery, Ld.'s, Deed, In re Trusts of	[1925] Ch. 532*n.*	583
Leiston Gas Company *v.* Leiston-cum-Sizewell Urban District Council	[1916] 2 K. B. 428	150
Le Loir *v.* Bristow	4 Camp. 134	320
Leng, In re	[1895] 1 Ch. 652	416
Lewis *v.* Campbell	8 Taunt. 715	9
Lole *v.* Betteridge	[1898] 1 Q. B. 256	140
London and North Western Railway Company *v.* Evans	[1893] 1 Ch. 16	181
London County Commercial Reinsurance Office, In re.	[1922] 2 Ch. 67	52
London County Council *v.* Attorney-General	[1902] A. C. 165	128
Long Eaton Recreation Grounds Company *v.* Midland Railway Company.	[1902] 2 K. B. 574	151, 275
Lovesy *v.* Smith	15 Ch. D. 655	289
Lugar *v.* Harman	1 Cox, 250	361

M.

Mackay, In re	[1911] 1 Ch. 300	580
Manchester Corporation *v.* New Moss Colliery, Ld.	[1906] 1 Ch. 278	151
Marchant *v.* Lee Conservancy Board	L. R. 9 Ex. 60	192
Marsh, In re	38 Ch. D. 630	353
Marten, In re	[1902] 1 Ch. 314	220
Martyn *v.* Williams	1 H. & N. 817	7
Mason *v.* Baker	2 K. & J. 567	361
Masson, In re	86 L. J. (Ch.) 753	521
Matthey *v.* Curling	[1922] 2 A. C. 180	150, 275
May, In re	45 Ch. D. 499	407
Merchants of the Staple of England (Mayor, &c.) *v.* Governor and Company of Bank of England	21 Q. B. D. 160	502
Mersey Steel and Iron Company *v.* Naylor, Benzon & Co.	9 App. Cas. 434	104
Metropolitan Water Board *v.* Dick, Kerr & Co., Ld.	[1918] A. C. 119	151, 275
Milnes *v.* Branch	5 M. & S. 411	1
Mitchell, In re	[1913] 1 Ch. 201	114
Mondel *v.* Steel	8 M. & W. 858	310
Moneypenny *v.* Hartland	2 Car. & P. 378	320
Montreal (Bank of) *v.* Stuart	[1911] A. C. 120	291
Morice *v.* Bishop of Durham	9 Ves. 399	249
———	10 Ves. 521	241

N.

National Trustees Company of Australasia *v.* General Finance Company of Australasia	[1905] A. C. 373	572

		PAGE
Nedby *v.* Nedby	5 De G. & Sm. 377	302
New South Wales Taxation Commissioners *v.* Palmer	[1907] A. C. 179	406
Nickoll *v.* Ashton	[1901] 2 K. B. 126	281
———, Ex parte	13 Q. B. D. 469	140
Nunn *v.* Barlow	1 S. & St. 588	403

O.

Offin *v.* Rochford Rural District Council	[1906] 1 Ch. 342	263
O'Grady *v.* Wilmot	[1916] 2 A. C. 231	349
Oliver, In re	62 L. T. 533	481
Oriental Commercial Bank, In re	L. R. 7 Ch. 99	100
Osborne *v.* Bradley	[1903] 2 Ch. 446	227

P.

Page *v.* Horne	11 Beav. 227	289
Paine, In re	[1897] 1 Q. B. 122	93
Pakenham's Case	(1368) Co. Litt. 385*a*; Y. B. 42 E. 3, 3, cited	19
Palmer, In re	[1893] 3 Ch. 369	165
Palmer *v.* Day & Sons	[1895] 2 Q. B. 618	100
Paradine *v.* Jane	Aleyn, 26	150, 275
Parbury's Case	[1896] 1 Ch. 100	504
Parker, In re	[1894] 3 Ch. 400	101
———	117 L. T. 422	371
Patent Agents, Institute of *v.* Lockwood	[1894] A. C. 347	126
Paterson *v.* Gas Light and Coke Company	[1896] 2 Ch. 476	551
Peacock *v.* Stockford	3 D. M. & G. 73	361
Peat *v.* Jones	8 Q. B. D. 147	99
Pêcheries Ostendaises (Soc. Anon.) *v.* Merchants' Marine Insurance Company	[1928] 1 K. B. 750	429
Peek *v.* Matthews	L. R. 3 Eq. 515	227
Phillips *v.* Cayley	43 Ch. D. 222	353
——— *v.* London School Board	[1898] 2 Q. B. 447	193
Pickwell *v.* Spencer	L. R. 7 Ex. 105	481
Piggott *v.* Goldstraw	65 J. P. 259	264
Plowden, In re	24 Times L. R. 883	521
Poole *v.* Huskinson	11 M. & W. 827	269
Prior's Case, The	(1368) Co. Litt. 385*a*	9
Prosser, In re	[1929] W. N. 85	361
Public Works Commissioner (Cape Colony) *v.* Logan	[1903] A. C. 355	181

R.

Randall *v.* Rigby	4 M. & W. 130	5
Redmond *v.* Dainton	[1920] 2 K. B. 256	151
Rees, In re	[1920] 2 Ch. 59	199
——— *v.* Engelback	L. R. 12 Eq. 225	481

		PAGE
Reg. *v.* Morton	L. R. 2 C. C. 22	503*n.*
—— *v.* Ramsgate Corporation	23 Q. B. D. 66	194
Rex *v.* Earl of Crewe	[1910] 2 K. B. 576	178
—— *v.* Hampden	3 St. Tr. 825	181
—— *v.* Larwood	1 Raym. 29	179
—— *v.* Lyon	[1921] 1 K. B. 203	543
—— *v.* Minister of Health. Ex parte Yaffe	[1930] 2 K. B. 98	178
Rhoades, In re	[1899] 2 Q. B. 347; affirming [1899] 1 Q. B. 905	392, 402
Roach *v.* Wadham	6 East, 289	6
Robinson *v.* Cowpen Local Board	63 L. J. (Q. B.) 235	265
———— *v.* Harkin	[1896] 2 Ch. 415	580
Roper *v.* Williams	T. & R. 18	227
Ropner & Co. *v.* Stoate, Hosegood & Co.	92 L. T. 328	310
Rose *v.* Hart	8 Taunt. 499; 2 Sm.L. C., 12th ed., p. 276	97, 107
Rowell *v.* Satchell	[1908] 2 Ch. 212	482
Royal British Bank *v.* Turquand	6 E. & B. 337	505
Ruben *v.* Great Fingall Consolidated	[1906] A. C. 439	497
Rumball *v.* Schmidt	8 Q. B. D. 603	131*n.*
Russell Skinner, In re	[1924] W. N. 65	220

S.

Salford Guardians *v.* Dewhurst	[1926] A. C. 619	543
Sampson *v.* Barton	2 Br. & B. 89	107
Samson, In re	[1906] 2 Ch. 584	404
Sarson, In re	[1925] Ch. 31	371
Sass, In re	[1896] 2 Q. B. 12	98
Sayers *v.* Collyer	28 Ch. D. 103	227
Scowcroft, In re	[1898] 2 Ch. 638	240
Seabrook, In re	[1911] 1 Ch. 151	220
Sharman, In re	[1901] 2 Ch. 280	450
Sharp *v.* Hainsworth	3 B. & S. 139	310
—— *v.* Harrison	[1922] 1 Ch. 502	228
Shepherd *v.* Harris	[1905] 2 Ch. 310	580
Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration, In re	[1915] 3 K. B. 676	151, 275
Shirley *v.* Lord Ferrers	7 Ves. 503*n.*	352
Simm *v.* Anglo-American Telegraph Co.	5 Q. B. D. 188	504
Skinner Russell, In re	[1924] W. N. 65	220
Small *v.* Smith	10 App. Cas. 119	194
Smith, In re	[1913] 2 Ch. 216	443
——— *v.* Buxton	8 B. W. C. C. 196; 1911–1920 Digest, 4408	543
——— *v.* Mawhood	14 M. & W. 452	47
Sobey *v.* Sainsbury	[1913] 2 Ch. 513	227
Sobhuza II. *v.* Miller	[1926] A. C. 518	178
Southern Rhodesia, In re	[1919] A. C. 211	181
Speight *v.* Gaunt	9 App. Cas. 1	578
Spencer's Case	5 Co. 16*a*; 1 Sm. L. C., 12th ed., pp. 62, 98	7
Stait *v.* Fenner	[1912] 2 Ch. 504	381
Stevens *v.* Chown	[1901] 1 Ch. 894	125
Stickney *v.* Keeble	[1915] A. C. 386	35

		PAGE
Stokes *v.* Twitchen	2 Moore, C. P. 538; 8 Taunt. 492	53
Summers Brown's Patent, In re	39 R. P. C. 367	69
Sutcliffe, In re	[1929] 1 Ch. 123	219
Sykes *v.* Sykes	L. R. 3 Ch. 301	162

T.

Tamplin (F. A.) Steamship Co., Ld. *v.* Anglo-Mexican Petroleum Products Co., Ld.	[1916] 2 A. C. 397	150, 275
Tarrant's Trust, In re	58 L. J. (Ch.) 780	350
Taunton *v.* Royal Insurance Company	2 H. & M. 135	195
Taurine Company, In re	25 Ch. D. 118	502
Taylor, In re	[1910] 1 K. B. 562	113
——— *v.* Caldwell	3 B. & S. 826	275
Tetley, In re	[1923] 1 Ch. 258	242
Theobald *v.* Crichmore	1 B. & Ald. 227	182
Thornber *v.* Wilson	3 Drew. 245; 4 Drew. 350	198
Thornton *v.* Howe	31 Beav. 14	242
Thornton *v.* Place	1 Moo. & R. 218	316
Tilley *v.* Thomas	L. R. 3 Ch. 61	35
Townshend (Lord) *v.* Windham	2 Ves. Sen. 1	349
Tulk *v.* Moxhay	2 Ph. 774	24
Turnbull *v.* Duval	[1902] A. C. 429	302

U.

Uxbridge and Rickmansworth Railway Company, In re	43 Ch. D. 536	149

V.

Van Wart, In re	Times Newsp., Feb. 17, 1911	199
Venn and Furze's Contract, In re	[1894] 2 Ch. 101	484

W.

Walbran, In re	[1906] 1 Ch. 64	361
Walsh *v.* Bishop of Lincoln	L. R. 10 C. P. 518	532
Warr (Frank) & Company, Ld. *v.* London County Council	[1904] 1 K. B. 713	150, 275
Watkins *v.* Cheek	2 S. & St. 199	483
Weall, In re	42 Ch. D. 674	579
Wedgwood, In re	[1915] 1 Ch. 113	242
———	[1921] 1 Ch. 601	371
Western Counties Railway Company *v.* Windsor and Annapolis Railway Company	7 App Cas. 178	183
Weston's Case	L. R. 4 Ch. 20	237

		PAGE
Whitaker, In re	[1901] 1 Ch. 9	403
White, In re	[1893] 2 Ch. 41	242
Whiteley *v.* Delaney	[1914] A. C. 132	482
Whiting, In re	[1913] 2 Ch. 1	162
Whittaker, Ex parte	63 L. T. 777	93
Wilkins, In re	[1920] 2 Ch. 63	165
Williams *v.* North's Navigation Collieries (1889), Ld.	[1906] A. C. 136	316, 317
——— *v.* Williams	[1900] 1 Ch. 152	220
Willis *v.* Barron	[1902] A. C. 271	302
——— *v.* Curtois	1 Beav. 189	521
——— *v.* Thorp	L. R. 10 Q. B. 383	317
Wilson *v.* Tavener	[1901] 1 Ch. 578	150, 275
Windus *v.* Windus	6 D. M. & G. 549	450
Wolmershausen *v.* Gullick	[1893] 2 Ch. 514	93
Wyman *v.* Paterson	[1900] A. C. 271	578
Wynne *v.* Tempest	[1897] W. N. 48; [1897] 1 Ch. 110	580

Y.

Yaffe, Ex parte. Rex *v.* Minister of Health	[1930] 2 K. B. 98	178

Z.

Zouche (Baroness), In re	[1919] 2 Ch. 178	521

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

GRANT *v.* EDMONDSON.

[1929. G. 228.]

C. A.
1930
July 4, 7, 8, 9, 29.

Rentcharge—Covenant to pay—Benefit of Covenant not running with Rentcharge—Absence of Word of Inheritance in Limitation—Intention to create a perpetual Rentcharge—Direct reference to Limitations exhausting the Fee Simple.

The benefit of a covenant to pay a rentcharge does not run with the rentcharge at law, but the covenant is only in gross.

Dictum of Holt C.J. in *Brewster* v. *Kidgill* (1697) 12 Mod. 166, 170 not followed. *Milnes* v. *Branch* (1816) 5 M. & S. 411 followed. *Bally* v. *Wells* (1769) Wilmot, 341 ; 3 Wils. 25 distinguished.

By deed dated April 26, 1867, the Earl of Wilton, the tenant for life of the Wilton estates, in exercise of certain powers under a private Act, conveyed part of the settled lands to E. in fee simple ; and E. granted thereout to the Earl and the person or persons who would for the time being have been entitled to the receipt of the rents and profits thereof if the conveyance had not been made, yearly and for every year for ever thereafter the rent of 142*l.* 7*s.* 3*d.* There were the usual powers of distress and entry and a covenant by the grantee for himself, his heirs, executors, administrators and assigns with the Earl his heirs and assigns and other the person or persons who would for the time being have been entitled as aforesaid that he, the grantee, his heirs and assigns, would pay the yearly rent thereby reserved to the person or persons entitled thereto under the reservation thereinbefore contained.

The Earl died in 1882, and under and by virtue of various deaths and two successive disentailing deeds and resettlements the Wilton estates passed ultimately to the present infant tenant in tail and became vested in the plaintiffs as statutory owners thereof. In none of those title deeds

C. A.
1930
GRANT
v.
EDMONDSON.

was there an express assignment of the benefit of the covenant to pay the rentcharge.

E. died in 1887, leaving a will of which the first defendant was executor, he and the other defendants being the present trustees thereof. In 1920 the trustees sold and conveyed the land conveyed to their testator in 1867 to W. in fee simple, subject to the rentcharge and to the covenants on the part of the grantee contained in the conveyance of 1867. In 1927 W. became bankrupt, and by an order of August 8, 1929, the bankrupt's interest in the land was vested in the plaintiffs in fee simple.

Payments of the rentcharge having ceased to be made since December 25, 1927, the plaintiffs brought this action for payment by the defendants of 231*l.*, the arrears which accrued down to the date when the land was vested in them :—

Held, (1.) that notwithstanding the absence of express words of limitation a perpetual rentcharge had been effectually created.

(2.) that the benefit of a covenant to pay the rentcharge did not run with the rentcharge.

(3.) that s. 5 of the Real Property Act, 1845 (now s. 56 of the Law of Property Act, 1925), did not affect the second question, as the section only applied to covenants which ran with the land or property: *Forster* v. *Elvet Colliery Co.* [1908] 1 K. B. 629 followed on this point.

Decision of Clauson J. [1930] 2 Ch. 245 affirmed.

APPEAL from a decision of Clauson J. (1)

By deed dated April 26, 1867, and made between the Right Hon. Thomas Earl of Wilton of the one part and John Beeby Edmondson of the other part in consideration of the yearly rent and the covenants on the part of John B. Edmondson thereinafter respectively reserved and contained the Earl, being tenant for life of the Wilton settled estates, which included a plot of land at Crumsal in the county of Lancaster, in exercise of certain powers under a private Act (7 Will. 4 and 1 Vict. c. xxxvii.), conveyed the said plot of land to John B. Edmondson in fee simple and John B. Edmondson by the same deed granted out of the plot to " the said Earl and the person or persons who would for the time being have been entitled to the receipt of the rents and profits of the said plot, if the conveyance had not been made and executed yearly and for every year for ever thereafter the rent or yearly sum of 142*l.* 7*s.* 3*d.* by equal half-yearly payments." The conveyance contained powers of distress and entry in the usual form and the following covenant: " And the said

(1) [1930] 2 Ch. 245.

grantee doth hereby for himself his heirs executors administrators and assigns covenant with the said Earl his heirs and assigns and other the person or persons who would for the time being have been entitled as aforesaid that he the grantee his heirs and assigns shall from time to time and at all times hereafter . . . . pay or cause to be paid the yearly rent hereby reserved to the person or persons entitled thereto under the reservation hereinbefore contained."

C. A.
1930
GRANT
v.
EDMONDSON.

The Earl died in 1882, and under and by virtue of various deaths and two successive disentailing deeds and resettlements, the Wilton estates passed ultimately under the will of the sixth Earl, who died in the year 1927, to the seventh Earl, the present tenant in tail, who was born in the year 1921, and became vested in the plaintiffs in the action, as statutory owners thereof, the plaintiffs being in fact the representatives of the sixth Earl under a probate of his will limited to the settled estates. In none of the title deeds was there an express assignment of the benefit of the covenant to pay the rentcharge.

John B. Edmondson died on May 4, 1887, leaving a will of which the first defendant Thomas John Edmondson was executor, he and the other defendants being the present trustees of the will, who admitted that they had in their hands some assets forming part of their testator's estate. In the year 1920, those trustees of John B. Edmondson's will sold the plot of land in question to Arnold Williams and conveyed it to him in fee simple subject to the payment of the yearly rentcharge and to the observance and performance of the covenants on the part of John B. Edmondson and the conditions contained in the conveyance of April 26, 1867. The conveyance to Arnold Williams contained a covenant by him his heirs and assigns with the trustees to pay the yearly rent and to observe and perform those covenants and conditions and to indemnify the trustees against non-payment of the rent or breach of any of those covenants. In the year 1927 Arnold Williams was adjudicated bankrupt and his trustee having disclaimed all interest in the plot of land, by an order made on August 8, 1929, the bankrupt's interest therein was, subject to the rentcharge, vested in the plaintiffs in fee simple.

The rentcharge was paid down to December 25, 1927.

In the action the plaintiffs claimed (1.) a declaration that, as statutory owners of the Wilton estates, which included the rentcharge under the deed of April 26, 1867, they were entitled to recover from the defendants as trustees or, in the alternative, from the defendant Thomas John Edmondson as executor of the will of John B. Edmondson deceased the sum of 231*l*., being the arrears of rentcharge which accrued, down to the date when the plot of land was vested in them and (2.) payment of those arrears. The defendants denied that the plaintiffs were entitled to the benefit of the covenant in the deed of April 26, 1867, and pleaded that it was a covenant in gross with the Earl personally and did not run with the rentcharge, so as to be enforceable by the plaintiffs, and further, that the charge merged in the inheritance of the land, which by force of the order of August 8, 1929, became vested in the plaintiffs.

At the trial of the action the point was raised for the first time whether by the deed of April 26, 1867, the rentcharge was effectually vested in the Earl for an estate in fee simple or whether, owing to the absence of strict words of inheritance, the Earl was entitled only to a life estate.

Clauson J. held that the deed of April 26, 1867, effectually limited a perpetual rentcharge, but that the covenant to pay the rentcharge did not run with the rentcharge at law, but was a covenant collateral or in gross. He also held on the authority of *Forster* v. *Elvet Colliery Co.* (1) that s. 5 of the Real Property Act, 1845 (now the Law of Property Act, 1925, s. 56), referred only to covenants which ran with the land or other property, so that the section carried the matter no farther.

The plaintiffs appealed. The appeal was heard on July 4, 7, 8, 9, 1930.

Cleveland-Stevens K.C. and *J. T. Edgerley* for the appellants. The benefit of a covenant to pay a rentcharge runs with the

(1) [1908] 1 K. B. 629.

rentcharge at law, so as to entitle an assignee of the covenantee to sue on the covenant: *Forster* v. *Elvet Colliery Co.* (1), where a covenant to pay compensation for damage caused by the subsidence of the surface of land was held to be a covenant of which the benefit passed. That was because the covenant necessarily affected the value of the land, and so here the covenant to pay the rentcharge necessarily affects its value. It is not a covenant collateral, but is beneficial to the owner of the rentcharge and to no one else. Further, such a covenant will run with an incorporeal hereditament, and therefore the covenant runs here with the rentcharge: *Bally* v. *Wells* (2), where it was held that a covenant might run with tithes. In *Brewster* v. *Kidgill* (3) Holt C.J. said: "I make no doubt but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." It is true that this is a dictum which does not appear in other reports of the case, and in *Milnes* v. *Branch* (4) Lord Ellenborough thought the statement was extra judicial, and decided that assigns of the covenantee could not sue on the covenant to pay the rent. In that case however Bayley J. based his judgment on the fact that the rent was not granted by the owner of the fee, as it arose out of the estate of the feoffors, and said that the covenant was therefore a covenant in gross. Technically, owing to the form of the conveyance, the covenant was in gross, because it was made by one who was not the owner of the land at the time of the creation of the rentcharge. Further the case might have been decided as it was on the ground that the persons suing were not assigns of the rent but only lessees for a term of 1000 years. The decision in *Randall* v. *Rigby* (5) is also to be explained on the ground that the covenant was not entered into by the person whose land was charged at the time when the rentcharge was granted. These cases are fully discussed in Sugden's Vendors and Purchasers, 14th ed., pp. 590, 591, and Lord St. Leonards there states his agreement with Holt C.J.'s dictum. In *Haywood* v. *Brunswick Building Society* (1) the question both of the benefit and burden of a covenant running arose. Brett L.J. expressed the opinion (2) that *Milnes* v. *Branch* (3) must be understood, as Lord St. Leonards had done, to decide that a covenant to build did not run with the rent in the hands of an assignee. In *Austerberry* v. *Corporation of Oldham* (4) Fry L.J. refers to the opinion expressed by Holt C.J. in *Brewster* v. *Kidgill* (5), and points out that although the other judges concerned in that case differed on the question of construction, they did not appear to have differed on the point of law discussed by Holt C.J. Again the question whether the benefit of a covenant to pay a rentcharge runs with the rent was not in terms decided in *Gwyn* v. *Neath Canal Navigation Co.* (6), but it is assumed throughout: compare also *Roach* v. *Wadham.* (7)

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(1) [1908] 1 K. B. 629, 635; S. C. sub nom. *Dyson* v. *Forster* [1909] A. C. 98, 102.

(2) Wilmot, 341; 3 Wils. 25.

(3) 12 Mod. 166, 170.

(4) 5 M. & S. 411, 417.

(5) (1838) 4 M. & W. 130.

[LORD HANWORTH M.R. referred to *Dewar* v. *Goodman.* (8)]

The view contended for is supported by the opinion expressed in Bythewood and Jarman's Precedents in Conveyancing, 3rd ed., vol. ix., p. 360; and see Prideaux's Precedents in Conveyancing, 16th ed., vol. i., p. 198; and Davidson's Precedents, 4th ed., vol. ii., Part I., p. 509. In Horsman's Precedents (1744), vol. ii., Part II., there are covenants for title but no covenant to pay.

Again reliance is placed on the use of the word "hereditaments" in the Real Property Act, 1845, which by s. 5 provides that under an indenture the benefit of a condition or covenant respecting "any tenement or hereditaments may be taken, although the taker thereof be not named a party to the same indenture." "Hereditaments" there must, having regard to s. 2 of the Act, where express reference is made to "corporeal . . . . hereditaments," include incorporeal hereditaments, and the section clearly contemplates therefore that the benefit of a covenant may run with an incorporeal hereditament. In the Settled Land Act, 1925, s. 39, sub-s. 4, it is expressly provided that where a tenant for life sells settled land in consideration of a rentcharge "the conveyance shall contain a covenant by the purchaser for payment of the rent." If the covenant were enforceable by the tenant for life only, the requirement would be pointless, for there is no reason why the tenant for life should be compelled to take such a covenant for his own benefit only.

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(1) (1881) 8 Q. B. D. 403.
(2) Ibid. 407.
(3) 5 M. & S. 411.
(4) (1885) 29 Ch. D. 750, 785.
(5) 12 Mod. 166, 170.
(6) (1868) L. R. 3 Ex. 209.
(7) (1805) 6 East, 289.
(8) [1909] A. C. 72.

There remains the subsidiary point raised in the Court below, whether the conveyance of April 26, 1867, creating the rentcharge contained a valid gift of the rentcharge in fee simple in the absence of the word "heirs." Clauson J. held that it did, and it is submitted that he was right.

Sir Thomas Hughes K.C. and *Beebee* for the respondents. The judgment of Clauson J. was correct and for the reasons stated by him. The benefit of a covenant can only run with land of the covenantee. Here there is no land with which the covenant can run. It cannot run with an incorporeal hereditament except in the case of landlord and tenant. The only authority supporting the appellants' contention is the dictum of Holt C.J. in *Brewster* v. *Kidgill.* (1) In *Bally* v. *Wells* (2) there was a lease of tithes, and the benefit of the covenant in question ran by reason of the statute 32 Hen. 8, c. 34, which expressly applies to incorporeal hereditaments, and for the first time gave assignees of the reversion the advantage of all covenants against the lessees. This explanation receives support from *Martyn* v. *Williams.* (3) When there is not the relation of lessor and lessee the position is entirely different. Thus the better view is that the burden of a covenant does not run with the land at law except between lessor or lessee: *Spencer's Case.* (4) Other reports of *Brewster* v. *Kidgill* (5) do not contain the dictum of Holt C.J. On the other hand *Milnes* v. *Branch* (6) is a clear decision that the benefit of a covenant

(1) 12 Mod. 166.
(2) Wilmot, 341.
(3) (1857) 1 H. & N. 817.
(4) (1583) 5 Co. 16*a*; 1 Sm. L. C., 12th ed., 62, 98.
(5) 1 Ld. Raym. 317; Holt, 175
(6) 5 M. & S. 411.

to pay a rentcharge does not run. That case has always been treated as good law, and it was adopted in *Randall* v. *Rigby* (1); see also 1 Wms. Saund. (1871), 1st ed., p. 303; Burton's Compendium, 7th ed., p. 347; and Halsbury's Laws of England, vol. xxiv., p. 517, all of which treat Lord Ellenborough's decision in *Milnes* v. *Branch* (2) as right and the dictum of Holt C.J. in *Brewster* v. *Kidgill* (3) as wrong. Brett L.J. in *Haywood* v. *Brunswick Building Society* (4) also accepts *Milnes* v. *Branch* (2), which he says must be understood as Lord St. Leonards understood it: Sugden's Vendors and Purchasers, 14th ed., pp. 590, 591*n*. In *Austerberry* v. *Corporation of Oldham* (5) Cotton L.J. dealt in the main with the question whether the benefit of the covenant in that case would run with the land, leaving Fry L.J. to deal mainly with the question whether the burden of the covenant would run. So read it is contended that Fry L.J. cannot be taken to have approved Holt C.J.'s dictum in *Brewster* v. *Kidgill*. (3) Here the land retained by the covenantee had no connection with the land out of which the rentcharge was granted, so that the covenant cannot be said to touch the land of the covenantee. The covenantee having retained no interest in the land out of which the rent issues, it is therefore a rent in gross and the covenant to pay it is also in gross. In *Kennedy* v. *Stewart* (6) Holt C.J.'s dictum was treated as of no authority, and in *Butler* v. *Archer* (7) the judges all agreed in recognizing the authority of *Milnes* v. *Branch* (2), although the decision there depended on Irish statutes and is not of value.

Again s. 5 of the Real Property Act, 1845, only applies to covenants running with the land: *Forster* v. *Elvet Colliery Co.* (8) That decision stands, although Lord Macnaghten expressed some doubt on the point in the appeal to the House of Lords, which was decided on different grounds. (9) Further, the section does not enable a person not in existence at the date the covenant was made to sue on it: *Kelsey* v. *Dodd.* (1)

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(1) 4 M. & W. 130.
(2) 5 M. & S. 411.
(3) 12 Mod. 166.
(4) 8 Q. B. D. 403, 407.
(5) 29 Ch. D. 750.
(6) (1836) 7 I. L. R. 421*n*.
(7) (1860) 12 Ir. C. L. R. 104.
(8) [1908] 1 K. B. 629.
(9) *Dyson* v. *Forster* [1909] A. C. 98, 102.

Lastly, the grant of the rentcharge was on its construction only a gift for the life of the Earl, there being no words of limitation. The learned judge got over the difficulty by reading in the limitations of the settlement of the Wilton settled estates, which exhausted the fee simple, and relied on *Gwyn* v. *Neath Canal Navigation Co.* (2) If, however, the Court was satisfied that there was enough to create a perpetual rentcharge it was not desired to press the point.

J. T. Edgerley in reply. The appellants have to show: (1.) that the benefit of a covenant can run with an incorporeal hereditament, and (2.) that this particular covenant touches or concerns the incorporeal hereditament. The reasoning upon which the benefit was held to run with the land in *Prior's Case* (3) referred to in *Spencer's Case* (4) applies equally to the case of an incorporeal hereditament. The view that this is so is supported by *Bally* v. *Wells.* (5) It is erroneous to say that this case depended on 32 Hen. 8, c. 34. That statute applies only to the remedies for and against assignees of the reversion, but in that case the original lessor was suing and the question was whether the burden of the covenant ran with the land of the lessee, which was a question of common law: see *Lewis* v. *Campbell.* (6) So too in *Egremont* (*Earl of*) v. *Keene* (7) a covenant to pay rent reserved on a demise of market tolls was held to run with the tenement and bind the assignee of the lessee. That case turned however in part on an Irish statute. Here the plaintiffs are suing as owners in fee simple of the rentcharge. In *Milnes* v. *Branch* (8) and *Kennedy* v. *Stewart* (9) leasehold interests were involved and the cases largely turned on this distinction. The latter case adds nothing to *Milnes* v. *Branch* (8); and *Butler* v. *Archer* (10) is not relevant to the present case, because it was concerned only with the question of the burden of the covenant and turned on the construction of an Irish statute. *Milnes* v. *Branch* (1) must be understood as turning on the form of the conveyance, which resulted in the covenantee having no interest in the land at the time the rent was granted. That view was taken by Brett L.J. in *Haywood* v. *Brunswick Building Society.* (2)

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(1) (1881) 52 L. J. (Ch.) 34.

(2) L. R. 3 Ex. 209.

(3) (1368) Co. Litt. 385 (*a*).

(4) 5 Co. 16*a*; 1 Sm. L. C., 13th ed., pp. 51, 55.

(5) Wilmot, 341; 3 Wils. 25.

(6) (1819) 8 Taunt. 715, 728.

(7) (1837) 2 Jones (Exch. Ir.) 307.

(8) 5 M. & S. 411.

(9) 7 I. L. R. 421*n*.

(10) 12 Ir. C. L. R. 104.

Again a covenant to pay a rentcharge clearly touches or concerns the rentcharge. A covenant by a lessee to pay rent was treated as running with both estates, and as the law relating to running with the land took its origin in the law relating to leaseholds and was applied by analogy to freeholds, a covenant to pay a rentcharge must touch or concern the rentcharge. Such a covenant might well increase the value of a rentcharge on its sale. A covenant to build stands on a different footing. It could not be said to affect the value of the rentcharge. In *Roach* v. *Wadham* (3) it is assumed that the burden of a covenant to pay a rentcharge would run with the land.

Cur. adv. vult.

July 29. LORD HANWORTH M.R. This is an appeal from an order made by Clauson J. on April 16, 1930, dismissing the action.

The action was brought to recover the arrears of a perpetual yearly rentcharge of the amount of 142*l.* 7*s.* 3*d.* payable under an indenture dated April 26, 1867, made between Thomas, second Earl of Wilton, and John Beeby Edmondson.

It is unnecessary to repeat the facts; they are fully stated in the judgment of Clauson J., wherein he traces the title to the rentcharge to the plaintiffs and how the fee simple of the plot of land out of which the rentcharge issues became revested in the plaintiffs, who are the statutory owners of the Wilton Settled Estates including the above rentcharge. Their claim is to enforce payment of certain arrears of the rentcharge unpaid since December 25, 1927. The plaintiffs

(1) 5 M. & S. 411.

(2) 8 Q. B. D. 403.

(3) 6 East, 289.

had not exercised their right of distress and entry at the time when it was available to them and, therefore, as Clauson J. points out, they have no practicable means of recovering these arrears unless they can succeed in recovering them from J. B. Edmondson's estate by virtue of his covenant in the deed of April 26, 1867, whereby John Beeby Edmondson covenanted for himself, his executors, administrators and assigns to pay the said rentcharge by half-yearly instalments on June 24 and December 25 in each year.

The defendant Thomas John Edmondson is the sole surviving executor, and he and the other defendants are the trustees of the will of the grantor of the rentcharge, John Beeby Edmondson, whose will was proved on May 4, 1887. It is admitted that the defendants have in their hands moneys which still form part of the estate of the grantor.

The defendants deny liability to the plaintiffs on the ground that the covenant relied upon was a covenant in gross with Thomas, Earl of Wilton, personally and did not run with the rentcharge—an incorporeal hereditament—so as to be enforceable by the plaintiffs or other persons who subsequently to the death of the second Earl of Wilton became entitled to the said rentcharge whether by assignment or otherwise.

There was another point argued before Clauson J.—namely, whether the deed of April 26, 1867, effectually limited a perpetual rentcharge in fee simple. This point was not insisted upon before this Court. It is sufficient to say that I agree with the conclusion upon it reached by Clauson J.

I turn, therefore, to the main point relied upon by the appellants—namely, that the plaintiffs as successors in title to the grantee of the rentcharge can sue the defendants on their testator's covenant to pay. As pointed out by Clauson J. in his judgment, there is a concurrence of text writers that the benefit of a covenant for the payment of the rentcharge cannot run with a rentcharge at law, but must be treated as a covenant in gross. Incidentally, I may mention that the note that he refers to in 1 Williams' Saunders, 5th ed. (1845),

p. 241 (1) has the authority of the joint editors of that edition, one of whom was Patteson J. and the other Sir Edward Vaughan Williams, who subsequently took his place upon the Bench. The note points out that the statute of Henry VIII., as was decided in *Spencer's Case* (2), only applies to covenants which run with the land and, of course, to the covenants which are expressly named in it whereby a lessee of, for example, tithes, is enabled to enforce a covenant to pay them. The note proceeds: "Therefore the assignee of a rentcharge is not within the statute; both because he has not the reversion, and because a covenant cannot run with a rent"—and for authority the case of *Milnes* v. *Branch* (3) is cited. That case, decided by the Court of King's Bench in 1816, fully supports the statement above quoted. Lord Ellenborough says that putting aside a dictum of Lord Holt, to which I will refer later, "I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal." Bayley J. was of the same opinion on this point, and added that the covenant was a covenant in gross; and Abbott J. concurred. The covenant in that case sued upon was not only to pay the rentcharge, but also to erect buildings upon the land out of which the rentcharge issued so as to enhance the security for the rentcharge, and in that sense touched and concerned the land, yet it was held to be personal to the covenantee.

In *Randall* v. *Rigby* (4), in which the decision turned upon whether debt or covenant was the right form of action to be brought by the plaintiff, Parke B. expressly refers to *Milnes* v. *Branch* (3) and says that it is an authority which establishes that where a covenant is collateral or in gross, "it does not run with the land or rent." See also *Canham* v. *Rust*. (5)

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(1) (1871 ed.), p. 303.
(2) 1 Sm. L. C., 13th ed., 51.
(3) 5 M. & S. 411, 417.
(4) 4 M. & W. 130,135.
(5) (1818) 8 Taunt. 227.

Coming to later decisions, in 1881 the case of *Haywood* v. *Brunswick Building Society* (1) was decided by a Court of Appeal composed of Brett L.J., Cotton L.J. and Lindley L.J. In that case the plaintiff was the assignee of one Charles Jackson to whom Edward Jackson had granted a rentcharge issuing out of land conveyed by Charles to Edward. Edward covenanted for himself, his heirs, executors, administrators and assigns that he would pay to Charles this rentcharge, and also erect and keep in repair, and if necessary rebuild, messuages upon the land of the value of double the rent. Edward assigned his interest to McAndrew who mortgaged the land to the defendants, and they had taken possession under their mortgage. The action was thus brought to enforce against the mortgagees in possession the duty of repairing the buildings which had been erected upon the land, but had not been kept in repair. No question arose upon the liability to pay the rentcharge. The question was whether the covenant to repair ran with the land in favour of the assignee of the covenantee and against the assignee of the covenantor; and secondly whether the defendants who had taken possession of the land with notice of the covenant must perform it. Stephen J. treated the covenant to build and repair as a personal covenant unenforceable by an assignee, and he relied upon *Milnes* v. *Branch* (2) as an authority upon that point, binding upon him. He, however, gave judgment for the plaintiff upon the second point above stated. The Court of Appeal reversed this judgment and held on both points that the action was not maintainable. Brett L.J. treats *Milnes* v. *Branch* (2) as an authority and says that it has always been understood as an authority to the effect that a covenant to build does not run with the rent in the hands of an assignee of the rent. He adds that Lord St. Leonards in his Vendors and Purchasers, 14th ed., p. 590, treats the case as warranting this statement. Cotton L.J. agrees with Brett L.J. and Lindley L.J. casts no doubt upon *Milnes* v. *Branch* (2), though it was not necessary for him to express any decided view upon it as in his judgment the

(1) 8 Q. B. D. 403.

(2) 5 M. & S. 411.

Lord Hanworth M.R.

defendant succeeded upon the second point. After this examination of *Haywood's* case (1) it appears to me that *Milnes* v. *Branch* (2) is good law and cannot be set aside at any rate in this Court.

In *Austerberry* v. *Corporation of Oldham* (3) all the members of the Court (Cotton L.J., Lindley L.J. and Fry L.J.) were of opinion that a covenant to repair the road in question did not run with the plaintiff's land, for there was no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular: see per Lindley L.J.

The doctrine that a covenant to pay a rentcharge does not run with the rent to the assignee of the rentcharge and the authority of *Milnes* v. *Branch* (2) was upheld in Ireland in 1844. See *Kennedy* v. *Stewart* (4) and per Lefroy C.J. and Hayes J. in 1860, see *Butler* v. *Archer*. (5)

Against this sequence of authority the opinion of Holt C.J. is relied upon as expressed in *Brewster* v. *Kidgill* (6), wherein he says: "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." Lord Ellenborough, in *Milnes* v. *Branch* (2), sets this opinion aside as being extra-judicial. It is introduced in a passage which commences: "There is another matter in which I have not consulted my brothers," and there does not appear to have been any assent given by the other judges to it.

In the report of the same case under the name of *Brewster* v. *Kitchin* (7) it would seem that Holt C.J. was speaking of the burden of the covenant, and the passage relied upon does not appear, nor is it to be found in Holt's Report under the names *Brewster* v. *Kitchel*. (8)

In a careful examination of the two reports—Lord Raymond and 12 Modern—which is to be found in 1 Smith's Leading Cases, 13th ed., pp. 78, 79, a passage which I have traced back to the third edition, which was edited by Sir Henry Keating and Sir James Shaw Willes, vol. i., pp. 32, 33, it is pointed out that the real difference between the judges was not whether an action of covenant could be maintained against the defendant, as assignee of the land, but whether that which Lord Holt considered a covenant was not, in reality, part of the grant; for if it were the plaintiff was entitled to judgment beyond all dispute, the action not being one of covenant, but a feigned issue to ascertain the net amount of the rentcharge. In other words, the judges who gave judgment for the plaintiff held that there had been a grant and that the liability did not depend upon covenant.

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(1) 8 Q. B. D. 403.
(2) 5 M. & S. 411.
(3) 29 Ch. D. 750, 781.
(4) 7 I. L. R. 421*n*.
(5) 12 Ir. C. L. R. 104, 121, 126.
(6) 12 Mod. 166, 170.
(7) 1 Ld. Raym. 317.
(8) Holt, 175.

It appears from this examination that the question to be determined in the case was that of the liability for the burden and not the question whether the assignee of the rent can enforce a covenant in gross. It would seem therefore that Lord Ellenborough was right in treating Lord Holt's statement as extra-judicial.

As pointed out by Brett L.J. in *Haywood's* case (1), Lord St. Leonards appears to accept the authority of the decision in *Milnes* v. *Branch* (2) in his text; but at the same time adds a note in which he gives reasons for agreeing with Lord Holt.

However high the authority of that note may be placed, it remains a note, and cannot avail to set aside the authority of *Milnes* v. *Branch* (2) or *Haywood* v. *Brunswick Building Society.* (1) The case of *Bally* v. *Wells* (3) does not appear to me to support the appellant's contention. In that case the question was whether the original covenantee could maintain an action against the assignee of the covenantor, and it was held that he could. The decision was upon the question of the liability for the burden and not of the right of the covenantee to sue.

The conclusion thus reached upon the main point argued concludes also the point raised upon s. 5 of the Real Property Act, 1845.

(1) 8 Q. B. D. 403.
(2) 5 M. & S. 411.
(3) Wilmot, 341.

Lord Cozens-Hardy M.R., in giving judgment in *Forster* v. *Elvet Colliery Co.* (1), expresses the opinion that a covenant therein referred to "respecting any tenements or hereditaments" must connote one which runs with the land. Farwell L.J. in terms says that the section applies only to covenants that run with the land, and the judgment of the Court carries that interpretation into effect. The decision in that case was affirmed in the House of Lords (*Dyson* v. *Forster* (2)), though Lord Macnaghten leaves it open, as in his view it was unnecessary to determine, whether the section was as confined in its operation as the Court of Appeal had held it to be.

The case as decided in the Court of Appeal is binding upon this Court, and it may be observed that no case has been called to our attention which conflicts with it, though it is now more than twenty-two years since it was decided.

I am, therefore, of opinion that this s. 5 does not enable the plaintiffs to maintain their action. For these reasons, in addition to those expressed by Clauson J., the appeal fails and must be dismissed with costs.

LAWRENCE L.J. In my opinion Clauson J. was clearly right in deciding that the rentcharge created by the conveyance of April 26, 1867, was a perpetual rentcharge, and as this decision has not been seriously challenged I need say no more than that I agree with the reasons given by the learned judge for arriving at his conclusion on this point.

The main question in this case is whether the benefit of the grantor's covenant to pay the rentcharge runs with the rentcharge so as to enable the assignees of the rentcharge to maintain an action on the covenant against the legal personal representatives of the grantor.

The learned judge in a considered judgment, after carefully reviewing all the relevant authorities, and after referring to the general opinion of the profession as reflected by the recognized text-books for many years past, came to the conclusion that it would be wrong for a judge of first instance

(1) [1908] 1 K. B. 629, 635.

(2) [1909] A. C. 98.

to throw any doubt upon the correctness of the view that the benefit of a covenant to pay a rentcharge does not run with the rentcharge.

I find myself in complete agreement with the learned judge, and am further of opinion that it would be equally wrong for the Court of Appeal to throw any doubt upon the correctness of that view.

Had it not been for the elaborate arguments addressed to this Court by counsel for the appellants, I should have been content to express my simple concurrence with the judgment of the learned judge; in deference, however, to those arguments, I propose to state the reasons which have led me to the same conclusion.

Counsel for the appellants based their contention upon the following dictum of Lord Holt in *Brewster* v. *Kidgill* (1): "I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted." From the report of that case in 12 Mod., it appears that the only issue between the parties was whether the rent was payable in full, or whether the defendant was entitled to deduct taxes which Parliament had imposed since the date of the grant. Lord Holt, after deciding that the covenant to pay the rentcharge free from all taxes extended to all future Parliamentary taxes, said that there was another matter upon which he had not consulted his brothers, and then proceeded to hold that the burden of the covenant did not run with the land out of which the rentcharge issued, and that, as the defendant was an assign of the grantor, the plaintiff could not have his judgment. It is in this part of the judgment (dealing with a point which had not been referred to in the arguments) that the dictum relied upon occurs. The report goes on to state that the other judges took a different view, and that judgment was accordingly entered for the plaintiff. In any view, the dictum was clearly obiter, as the plaintiff was not an assignee of the rent suing the grantor or his legal personal representatives. The case is also reported in 1 Lord Raymond,

(1) 12 Mod. 166, 170.

p. 317; 1 Salkeld, p. 198; and 5 Mod. p. 369, in none of which reports, however, is the dictum to be found.

Nearly 120 years later Lord Holt's dictum was considered by the Court of King's Bench in the case of *Milnes* v. *Branch.* (1) In that case one, Barnsby, the owner in fee, conveyed a plot of land to the defendant and another, their heirs and assigns to the use that Barnsby, his heirs and assigns might have and take to his use a rent certain to be issuing out of the plot and subject to the rent to the use of the defendant in fee, and the conveyance contained a covenant by the defendant with Barnsby his heirs and assigns (inter alia) to pay to him his heirs and assigns the said rent. Barnsby shortly afterwards demised the rent to the plaintiffs for 1000 years. The plaintiffs then sued the defendant on his covenant, and contended that, as representatives of the grantee of the rent by special assignment, they were entitled to maintain the action, relying upon Lord Holt's dictum in *Brewster* v. *Kidgill.* (2) The Court held that the plaintiffs could not sue the defendant on his covenant on two grounds, first, because a covenant could not run with a rentcharge, and, secondly, because the rent in that case was reserved, and arose out of the original estate and not out of the estate of the covenantor, and consequently there was no privity of estate between the covenantor and the plaintiff. Lord Ellenborough C.J., in giving the leading judgment, after stating that he was inclined to think that Lord Holt's dictum was extra-judicial, and that putting aside that dictum he did not find any authority to warrant the position that the covenant ran with the rent, said: "I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shown that this is land; it might as well be applied to any covenant respecting a matter merely personal. The stat. H. 8 recites that, at common law, such only as are parties or privies to any covenant can take advantage of it; here is neither privity of contract, nor privity of estate; the rent is reserved out of the original estate." Bayley J., after stating that he was entirely of the same

(1) 5 M. & S. 411.

(2) 12 Mod. 166, 170.

opinion, added some remarks emphasizing the second ground mentioned in the last sentence of Lord Ellenborough's judgment—namely, that the rent arose out of the estate of the feoffor, and that therefore the covenant was not one by the owner of the fee, but was a covenant in gross. Abbott J. concurred, and Holroyd J., having been of counsel in the case, declined to give any judgment.

There is no object in pursuing the second ground of the decision in the case of *Milnes* v. *Branch* (1), as no such question arises here. It was based on the erroneous view, somewhat widely entertained at that time, that in order to entitle the alienee to sue, he must not only claim the estate of the covenantee, but must also claim it under a conveyance or appointment by the covenantor. The Real Property Commissioners in their Third Report negative the soundness of this view, and consider that any doubt as to whether the doctrine of privity of estate applies to the covenantor as well as the covenantee is set at rest by authority. I agree with the statement in Dart on Vendors and Purchasers, 7th ed., p. 76, that it is impossible to see how this conclusion can be otherwise than correct, if *Pckenham Case* (2) and other well known authorities are good law.

The next case in which Lord Holt's dictum came up for consideration was the Irish case of *Kennedy* v. *Stewart* (1836) (3), reported in a note to *Bruce* v. *Lord Ponsonby*. (4) In that case the facts were somewhat special, and it is enough to state that the decision turned upon the question whether the benefit of the covenant by the grantor to pay the rentcharge did or did not run with the rent in favour of the assignees. Crampton J. held that it did not, and stated that on that question *Milnes* v. *Branch* (1) was an express authority, the principle being explicitly laid down by Lord Ellenborough in his judgment.

In *Randall* v. *Rigby* (5), where the Court of Exchequer held that an action of debt would not lie for arrears of a rentcharge in fee which the defendant had covenanted to pay, Parke B. said: "No doubt this covenant is collateral or in gross in one sense, that it does not run with the land or rent; for that *Milnes* v. *Branch* (1) is an authority."

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(1) 5 M. & S. 411.
(2) Co. Litt. 385*a*, Y.B. 42 E. 3, 3, cited.
(3) 7 I. L. R. 421*n*.
(4) (1844) 7 I. L. R. 414.
(5) 4 M. & W. 130.

In *Butler* v. *Archer* (2) the Court of Queen's Bench in Ireland considered the question of a covenant running with a rentcharge, and, although there was a difference of opinion between the learned judges owing to the special nature of the covenant and to the Irish legislation affecting the question, they all treated *Milnes* v. *Branch* (1) as having decided that a covenant to pay a rentcharge does not run with the rent. Hayes J., after stating that the covenant in question there was a mere covenant in gross, says (3): "It was so held in *Milnes* v. *Branch* (1), which has been considered a binding authority ever since, as well in England as in this country."

In my judgment that statement by Hayes J. is accurate, and holds good at the present day. I know of no case in which the decision of *Milnes* v. *Branch* (1) on this point has been questioned, and referring to some of the recognized textbooks on the subject it appears to me that Clauson J. was right in concluding that for many years past *Milnes* v. *Branch* (1) has been accepted by the profession as having established the proposition that a covenant to pay a rentcharge does not run with the rent. Thus, in Burton on Real Property, 7th ed. (1850), p. 347: "In particular it seems that the covenant of the grantor runs neither with the land nor with the rent; but is merely a personal engagement between the parties. *Milnes* v. *Branch*" (1); in Pollock on Contracts, 8th ed. (1911), p. 249 (4): "An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment; but by a somewhat curious distinction the burden of a covenant to pay a rentcharge does not run with the land charged, nor does the benefit of it run with the rent"; in Halsbury's Laws of England, vol. xxiv. (1912), p. 517, cl. 1021: "The due payment of a rentcharge is frequently secured by the covenant of the landowner who creates it. The burden of such a covenant does not run with the land so as to bind subsequent owners of the land; nor, it seems, does the benefit of the covenant run with the rentcharge so as to entitle subsequent owners of the rentcharge to sue," citing *Milnes* v. *Branch* (1) and other cases; and in 1 Smith's Leading Cases, 13th ed. (1929), p. 98, in the notes to *Spencer's Case*, *Milnes* v. *Branch* (1) is cited at length for the proposition that a covenant to pay the rentcharge does not run with the rent.

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(1) 5 M. & S. 411.

(2) 12 Ir. C. L. R. 104.

(3) 12 Ir. C. L. R. 121.

(4) 9th ed., p. 253.

The appellant's counsel, however, contended that the decision in *Milnes* v. *Branch* (1) ought not to be followed, pointing out that it is not binding on this Court, and that Lord St. Leonards had expressed his disapproval of it, as appears from his book on Vendors and Purchasers. Turning to Sugden's Vendors and Purchasers, 14th ed. (1862), pp. 585 to 591, I find an elaborate argument against the soundness of the conclusion reached by the Real Property Commissioners in their Third Report that the doctrine of privity of estate does not apply to the covenantor, and that *Milnes* v. *Branch* (1) is one of the cases cited in support of the contention that a covenant does not run with the land unless the conveyance of it was actually made by the covenantor. Then on p. 591, after referring to the case where the rent is created by way of use out of a grant to a third person, the text proceeds: "And even where the grantor of the rent to one directly, covenants to pay it to the grantee, etc., it is doubtful whether the covenant will run with the rent in the hands of an assignee," citing *Brewster* v. *Kidgill* (2); *Milnes* v. *Branch* (1); and *Butler* v. *Archer*. (3) The learned author appends a footnote to this statement in which he discusses Lord Holt's dictum in *Brewster* v. *Kidgill* (2), and Lord Ellenborough's decision in *Milnes* v. *Branch* (1), and states: "There appears to be no foundation for shaking Holt's opinion. The rent-charge is an incorporeal hereditament

(1) 5 M. & S. 411.
(2) 12 Mod. 166.
(3) 12 Ir. C. L. R. 104.

and issues out of the land, and the land is bound by it; the covenant, therefore, may well run with the rent in the hands of an assignee; the nature of the subject, which savours of the realty, altogether distinguishes the case from a matter purely personal." The note then refers to the decision in *Bally* v. *Wells*. (1) It will be seen therefore that Lord St. Leonards approved of *Milnes* v. *Branch* (2) in so far as it decided that the doctrine of privity of estate applied as well to covenantor as to covenantee, and that he disapproved of it in so far as it decided that a covenant could not run with a rentcharge.

In *Bally* v. *Wells* (1) an owner of tithes had demised them for a term of six years, and the lessee had covenanted not to allow the farmers of the land to have any of the tithes without the consent of the lessor. The lessee assigned his interest in the lease to the defendant, who let the farmers have the tithes without such consent, and thereupon the lessor brought an action of covenant against him. It was held that the covenant in question ran with the tithes, and therefore that the action was maintainable. The grounds of the decision were that no distinction could be drawn between land and tithe, and that the covenant was not collateral but touched or concerned the tithes. This case was relied upon by the plaintiffs in *Kennedy* v. *Stewart* (3), and Crampton J. distinguishes it in the following passage of his judgment with which I agree: "Covenant (for other reasons) runs along with the land, but it is quite new to extend the principle to rent-charges and annuities. It is argued again, that covenant will run with tithes to an assignee of the reversion, and it is asked, why should not the same principle apply to rent-charges? It has, undoubtedly, been so decided as to tithes, in the case of *Bally* v. *Wells* (1), but the analogy fails; the grounds assigned by the Court for the determination in *Bally* v. *Wells* (1) do not apply to the case of rent-charges. They see no difference between land and tithes; 'tithes is a tenth part (say the Court) of the profits of the land, and is land itself ' ; and I may add, rent may be reserved by lease for tithes as for land, and to reserve rent for a rent-charge would be absurd. Secondly: The case of an assignee suing the grantor is very different from that of the owner of the estate leased suing the assignee of a lessee upon a covenant by lessee for him and his assigns."

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(1) Wilmot, 341; 3 Wils. 25.

(2) 5 M. & S. 411.

(3) 7 I. L. R. 421*n*, 425*n*.

In *Martyn* v. *Williams* (1) the owner in fee granted to the defendant the right to dig china clay for a term of twenty-one years, and the lease contained a covenant by the defendant (inter alia) to deliver up the works in repair at the expiration of the term. The lessor afterwards conveyed the land to the plaintiff in fee, who brought an action for (inter alia) the breach of the covenant to deliver up in repair. It was held that the covenant ran with the interest of the owner of the fee expectant upon the determination of the term in the incorporeal right to dig the china clay, and that the alienee of the land could sue upon it. Martin B., in delivering the judgment of the Court, after referring to *Bally* v. *Wells* (2) and the Irish case of *Egremont* (*Earl of*) v. *Keene* (3), where it was held that a lessor of market tolls could maintain an action of covenant against the assignee of the lessee for the non-payment of rent, expressed the opinion that the conveyance of the land to the plaintiff during the subsistence of the term in the incorporeal hereditament was an assignment of the reversion within 32 Henry VIII., chapter 34, which in express terms extended to incorporeal hereditaments and was not confined to lands, and that consequently the statute enabled the Court to decide in favour of the plaintiff.

It is to be observed that *Bally* v. *Wells* (2); *Egremont* (*Earl of*) v. *Keene* (3); and *Martyn* v. *Williams* (1) are all cases as between lessor and lessee, and not as between a grantor and grantee in fee; a distinction which according to Lindley L.J. in the case of *Haywood* v. *Brunswick Building Society* (4) must never be lost sight of. In *Haywood's* case (4) land had been granted in fee in consideration of a rentcharge reserved

(1) 1 H. & N. 817.

(2) Wilmot, 341.

(3) 2 Jones (Exch. Ir.) 307.

(4) 8 Q. B. D. 403, 410.

by the grantor to himself in fee and of a covenant by the purchaser to erect and repair buildings. The assignee of the rentcharge brought an action against the alienee of the land for breach of this covenant. Three questions arose, first, whether the benefit of the covenant ran with the rentcharge in favour of the assignee of the rent, secondly, whether the burden of the covenant ran with the land so as to charge the alienee of the land, and, thirdly, whether the rule in *Tulk* v. *Moxhay* (1) applied so as to bind the alienee of the land in equity. Stephen J. held on the first point that *Milnes* v. *Branch* (2) was an authority directly in favour of the defendant and then adds: "It is true that Lord St. Leonards appears to disapprove of this decision: 2 Vendors and Purchasers, 14th ed., p. 591, note, but I must regard it as a binding authority till it is overruled." The learned judge then decided that the defendants were liable in equity on the authority of *Cooke* v. *Chilcott*. (3) The Court of Appeal reversed the decision of the learned judge on the latter point, and dismissed the action. Brett L.J. commences his judgment by saying: "I am clearly of opinion, both on principle and on the authority of *Milnes* v. *Branch* (2), that this action could not be maintained at common law. *Milnes* v. *Branch* (2) must be understood, as it always has been understood, and as Lord St. Leonards understood it, and it will be seen on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee."

It was suggested by Mr. Cleveland Stevens that this passage showed that the Lord Justice agreed with Lord St. Leonards' adverse comments on Lord Ellenborough's decision in *Milnes* v. *Branch*. (2) I do not agree with that suggestion. It may not perhaps be very clear what exactly the learned Lord Justice had in mind when referring to Lord St. Leonards' understanding of *Milnes* v. *Branch*. (2) It is however plain that he treated *Milnes* v. *Branch* (2) as an authority to be followed, and declined to overrule it, as he had been asked to do by the respondent. He could hardly have intended to affirm the second ground of the decision more particularly dealt with by Bayley J., as no point was made of the fact that the rentcharge was reserved and arose out of the original estate and not out of the estate of the covenantor. Moreover, as regards the first ground of the decision in *Milnes* v. *Branch* (1), it is clear that Lord St. Leonards understood that the Court had decided that a covenant could not run with a rentcharge, and that Lord Holt's dictum to the contrary ought not to be followed. Cotton L.J., after expressing his agreement with Brett L.J., dealt only with the question whether the rule in *Tulk* v. *Moxhay* (2) was applicable in the circumstances. Lindley L.J. did not deal with the question of the benefit of the covenant running with the rentcharge, and whilst not suggesting that *Milnes* v. *Branch* (1) was wrongly decided, pointed out that neither *Milnes* v. *Branch* (1) nor *Randall* v. *Rigby* (3) applied very closely, as in the former the plaintiff had only a leasehold interest in the rent, and in the latter the question was whether debt or covenant was the proper form of action. Although it is true that in *Milnes* v. *Branch* (1) the rentcharge had been demised for a term of a thousand years, the plaintiff pleaded that he was the representative of the grantee by special assignment, and was throughout the case treated as an assignee of the rent; moreover, the decision has ever since been treated as having laid down the principle that a covenant to pay a rentcharge does not run with the rent in the hands of an assignee. The ultimate decision in *Haywood's* case (4) was that the burden of a covenant to build does not run with the land, and that the rule in *Tulk* v. *Moxhay* (2) does not apply to such a covenant. In my opinion the Court of Appeal did not intend to cast any doubt on the decision in *Milnes* v. *Branch*. (1)

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(1) (1848) 2 Ph. 774.

(2) 5 M. & S. 411.

(3) (1876) 3 Ch. D. 694.

The case of *Austerberry* v. *Corporation of Oldham* (5) finally established that the rule in *Tulk* v. *Moxhay* (2) is

(1) 5 M. & S. 411.
(2) 2 Ph. 774.
(3) 4 M. & W. 130.
(4) 8 Q. B. D. 403.
(5) 29 Ch. D. 750.

limited to restrictive covenants and does not extend to covenants to expend money on repairs or otherwise which do not run with the land at law. Fry L.J., in his judgment, quotes a passage from Lord Holt's judgment in *Brewster* v. *Kidgill* (1) in support of the view that the burden of a covenant involving the expenditure of money does not run with the land. In quoting this passage, Fry L.J. included the dictum which has been so much discussed in this case, but he makes no comment on it, nor was it relevant to the question being there considered. In the circumstances I do not think that the absence of an adverse comment implies that Fry L.J. approved of the dictum and disagreed with the decision in *Milnes* v. *Branch*. (2)

Some reliance was placed by the appellants on the provision in s. 39, sub-s. 4, of the Settled Land Act, 1925, that on a sale by a tenant for life in consideration of a rent the conveyance should contain a covenant by the purchaser for the payment of the rent. I confess that I feel a difficulty in finding any satisfactory reason for this enactment except on the supposition that the Legislature thought that the benefit of such a covenant would run with the land in favour of the remaindermen, but in view of the established rule of law that such a covenant does not run with the rentcharge, I am of opinion this enactment cannot properly be construed as abrogating that rule and enacting that in future such a covenant shall so run.

Whatever may be the foundation of the rule, and whether it rests on the broader principle that (except as between lessor and lessee) no covenant can run with an incorporeal hereditament, or whether it rests on the narrower principle that a covenant to pay a rentcharge is a collateral covenant or a covenant in gross which does not touch or concern the rentcharge or whether it rests on no principle and is merely arbitrary, I am of opinion that it is too firmly established to be disturbed by this Court.

There remains the contention that even if the covenant did not run with the rentcharge the appellants are entitled

(1) 12 Mod. 166.

(2) 5 M. & S. 411.

to the benefit of the covenant by virtue of s. 5 of the Real Property Act, 1845. In my opinion this point is concluded against the appellants by authority binding on this Court. In the case of *Kelsey* v. *Dodd* (1) Sir George Jessel M.R. held that s. 5 merely got rid of the objection as to the covenantee not being a party to the deed, but that it did not enable the benefit of a covenant to be taken by a person not in existence at the date of the deed. In the case of *Forster* v. *Elvet Colliery Co.* (2) the Court of Appeal approved of the decision in *Kelsey* v. *Dodd* (1), and further held that the section applied only to covenants running with the land. It is true that when *Forster* v. *Elvet Colliery Co.* (2) came before the House of Lords, Lord Macnaghten said that it might be perhaps doubtful if the latter ground of the decision were correct (see *Dyson* v. *Forster* (3)), but it was not overruled, and consequently binds this Court.

As it is not suggested that the plaintiffs were alive in the year 1867 when the deed containing the covenant in the present case was executed, and as the covenant does not run with the rentcharge, it follows that on both grounds our decision must be that the appellants cannot take the benefit of the covenant under s. 5.

In the result, for the reasons stated, I agree that this appeal should be dismissed with costs.

ROMER L.J. It was held by Clauson J. that the deed of April 26, 1867, was effectual to limit a rentcharge in fee simple notwithstanding the omission of the usual words of inheritance. He was, in my judgment, clearly right in so holding, having regard to the principle stated in Challis's Real Property, 3rd ed., p. 222, and to the provisions of the Wilton Estates Act of 1837. But, though he was so far in favour of the plaintiffs, he came to the conclusion that they were not entitled to the benefit of the covenant for payment of the rentcharge contained in the deed and accordingly dismissed the action. From that decision the plaintiffs appeal.

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(1) 52 L. J. (Ch.) 34, 39.

(2) [1908] 1 K. B. 629.

(3) [1909] A. C. 98, 102.

It becomes, therefore, necessary to decide whether the benefit of such a covenant runs with a rentcharge at common law. For, though the plaintiffs contended before us that they were in any case entitled to the benefit of the covenant by reason of the express provisions of s. 5 of the Real Property Act, 1845, it has been laid down by this Court in the case of *Forster* v. *Elvet Colliery Co.* (1) that the covenants mentioned in that section are covenants that run with the hereditament apart from the provisions of the section. That decision has never been overruled, though Lord Macnaghten expressed his doubts as to its correctness in the same case when it was before the House of Lords: see *Dyson* v. *Forster.* (2) If I may be permitted to criticize the decision I would venture to suggest that if it be correct the reference to covenants might just as well have been omitted altogether. It is, however, a decision that is binding upon this Court, and it therefore becomes unnecessary to consider whether the section refers to incorporeal hereditaments. For, assuming that it does, we have still to consider whether the covenant in question in the present case runs with the rentcharge apart from the section, and the section accordingly carries us no further.

I return, therefore, to the question whether the benefit of a covenant to pay runs with a rentcharge at common law. Speaking for myself, I regard this question as being identical with the question whether there is any case that decides that it does. For in connection with the subject of covenants running with land, it is impossible to reason by analogy. The established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical. Why should the benefit of a vendor's covenant run with the land at common law, and the benefit of a lessee's covenant not so run with the reversion, if that be the law, as seems to be the better opinion and was certainly the opinion of the Legislature in the time of Henry the Eighth? Why, too, should it have been held that the burden of a lessee's covenant runs with the land at common law, but that the burden of a purchaser's covenant

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(1) [1908] 1 K. B. 629.

(2) [1909] A. C. 98 102.

C. A.
1930
GRANT
v.
EDMONDSON.
Romer L.J.

does not so run? Why, again, should a covenant have to be one touching the land in order that the benefit and the burden of it may run? Why, for instance, in a lease of land to be used solely for a particular trade should a covenant by the lessor not to build any other house to be used for the same trade, not enure for the benefit of the lessee's assigns? Why, again, should a covenant by a lessee in connection with something not in esse at the date of the lease but to be done on the land in the future bind his assigns if they are expressly mentioned and not otherwise? All these and other cognate questions have been argued and discussed for centuries by men learned in the law and, so far as I have been able to ascertain, without coming to any very satisfactory, still less to any unanimous, conclusion. Apart, therefore, from decisive authority one way or another, it seems to me that it is impossible to answer the question whether a covenant to pay runs with a rentcharge one way or the other. The question "Why should it?" cannot be answered merely by reference to principles with any greater conviction than can the question "Why should it not?"

In these circumstances, I turn to the authorities to which our attention has been called. The first of these to which it seems necessary to refer is that of *Brewster* v. *Kidgill.* (1) In that case a rentcharge had been granted out of a manor, and the grantor had covenanted for payment of the rent freed from all taxes. The question to be determined was whether the defendant, who was the terre-tenant of the land charged, was entitled to deduct a particular tax. Holt C.J. delivered the opinion of the Court that the deduction could not be made. It appears to have been the view of the judges other than the Chief Justice that the rentcharge had been granted free of the particular tax. The Chief Justice, however, considered that the rentcharge had not been so granted, in which case apparently the tax could have been deducted by the defendant unless he were bound by the covenant made by the grantor of the rentcharge. As to this the Chief Justice said (2): "There is another matter in which I have not

(1) 12 Mod. 166. (2) 12 Mod. 170.

consulted my brothers, and that is, whether the terre-tenant in this case is obliged by the covenant: this is a covenant by the grantor of the rent, who was seised in fee of the manor. Now who this terre-tenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable in law; for this covenant does not run with the land. Hard. 87. I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted so to be paid, it would be another matter; but here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the terre-tenant, but in equity; and therefore for this point I do not see how the plaintiff can have his judgment." This expression of opinion that the benefit of the covenant would run with the rent was obviously a mere dictum, and was not even concurred in by the other judges. On this point, the Chief Justice, though purporting to deliver the judgment of the Court, had not consulted his brothers. Perhaps he could not find a convenient opportunity. For, according to Lord Raymond, they were much occupied in talking of "agreements, intent of the party, binding of the land, and I know not what." (1)

A case much more in point is that of *Milnes* v. *Branch*. (2) An owner of land in fee simple had in that case conveyed it to the use that he his heirs and assigns might have and take a rentcharge and subject thereto to the use of the defendant his heirs and assigns and the defendant covenanted with the owner of the land his heirs and assigns to pay the rent and to build one or more messuages on the premises for better securing the rent. The covenantee subsequently demised the rentcharge to the plaintiff in the action for 1000 years. The plaintiff then sued the defendant in covenant for non-payment of the rent and for not building the messuages. It was held that the plaintiffs were not entitled to sue upon the covenant. Bayley J. decided the case upon the ground

(1) 1 Ld. Raym. 322.

(2) 5 M. & S. 411.

that, having regard to the form of the conveyance, the rentcharge arose out of the estate of the covenantee and was not granted by the covenantor, and that the covenant was accordingly a covenant in gross. Lord Ellenborough on the other hand decided the case upon two grounds, of which the latter only was that upon which Bayley J. had founded his judgment. The first ground, however, was that the covenant did not run with the rent. He said this, referring to the case of *Brewster* v. *Kidgill* (1): "I am inclined to think that the language of Lord Holt, as to the right of the assignee of the rent to have covenant, was extra judicial; and putting aside that dictum, I do not find any authority to warrant the position that this covenant runs with the rent. I do not see how the analogy, as it regards covenants which run with the land, is to be applied, unless it be shewn that this is land; it might as well be applied to any covenant respecting a matter merely personal." It was contended before us that this passage in Lord Ellenborough's judgment is referable to the fact that the plaintiff had only a term of years in the rentcharge. I cannot accept this suggestion. It is, in my judgment, quite clear that Lord Ellenborough intended to decide and did in terms decide that the benefit of the covenant did not run with the rentcharge.

Unless, therefore, there is some other authority that conflicts with this decision, it is, in my opinion, decisive upon the question at issue. For myself, I cannot find that any of the cases cited to us throw any doubt at all upon the decision. On the contrary, there are cases both in England and Ireland in which the decision is treated as an authority for the proposition for which the respondents contend in the present case. I will not refer to them all. It is sufficient to refer to what was said by Parke B. in *Randall* v. *Rigby* (2), and by Brett L.J., as he then was, in *Haywood* v. *Brunswick Building Society*. (3) I must, however, refer at greater length to the cases which the appellant's counsel contend are in conflict with Lord Ellenborough's decision.

(1) 12 Mod. 166.

(2) 4 M. & W. 130.

(3) 8 Q. B. D. 403, 407.

The one most relied upon by them is the case of *Bally* v. *Wells.* (1) In that case the plaintiff as owner of certain tithes had granted a lease of them to one Whitmarsh who entered into a covenant with the plaintiff not to let any of the farmers of the lands from which the tithes issued have any part of them. Whitmarsh then assigned his lease to the defendant, and the question was whether the defendant was bound by the covenant. It was therefore one relating to the running of the burden of a covenant as between a lessor and a lessee. It was held that the defendant was liable on the covenant. In the course of his judgment Sir John Wilmot C.J. expressed the opinion that a covenant might be annexed to and pass with an incorporeal inheritance as well as a corporeal one. But this meant no more than that he could give no answer to the question "Why should it not?" Nor can I. The question, however, that has to be answered is the one "Why should it?" As regards this question he certainly gave various reasons why the burden of the particular covenant in that case should run with tithes as between a lessor and lessee. But the case is of no assistance in the present one unless we are to reason from some analogy between tithe and a rentcharge and between the lessee of of the one and the grantee of the other, and that is a thing which we ought not to do.

As Lindley L.J. said in *Austerberry* v. *Corporation of Oldham* (2): "We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing, upon the case which we have to consider." In *Haywood* v. *Brunswick Building Society* (3) he uttered a similar warning: "This is not a case of landlord and tenant; we must never lose sight of that distinction."

The next case to which reference should be made is that of *Martyn* v. *Williams* (4), which, it is contended, is an authority for the proposition that the benefit of a covenant will run with an incorporeal hereditament. In my opinion, it is nothing of the sort. The owner of land upon which there was a bed of china clay had granted to another a right to work such clay for a term of twenty-one years, the grantee entering into a covenant to deliver up the works in good repair at the end of the term. It was, indeed, held that the assignee of the land was entitled to sue upon the covenant. But, if the case be carefully looked at, it will be seen that this was because the plaintiff was regarded as being the assignee of the reversion in the china clay expectant upon the determination of the twenty-one years within the meaning of the statute of Henry VIII., just as truly as though he had been himself the grantee of a right to work the clay in perpetuity and had then granted the term of twenty-one years out of his own incorporeal hereditament. The decision therefore was one upon the statute, and has no bearing upon the question that we have to decide.

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(1) Wilmot, 341.
(2) 29 Ch. D. 750.
(3) 8 Q. B. D. 403, 410.
(4) 1 H. & N. 817.

The only other case to which I need refer is that of *Austerberry* v. *Corporation of Oldham.* (1) In itself it has no direct bearing upon the present case, being concerned with the question of when a covenant will be held to touch or concern the land of the covenantee. It is said, however, that Fry L.J. quoted with approval the passage from Lord Holt's judgment in *Brewster* v. *Kidgill* (2), to which I have already referred. That he quoted it is true enough, and that he approved of it so far as it was dealing with the burden of the covenant is obvious. For the Lord Justice was dealing with the question of the running of the burden of a covenant he was supposing to have been entered into by the grantors of a right of way over their road to maintain the road in repair. But I do not think that the Lord Justice was in any way considering the question whether the benefit of the covenant would run with the land for the convenience of which the right of way had been supposedly granted. He had already disposed of the question of the running of the benefit. Furthermore, if he had been dealing with the running of the benefit of such a covenant, it would have been necessary for him to decide whether the case for the appellant could properly be stated in what the Lord Justice said was the most

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(1) 29 Ch. D. 750.

(2) 12 Mod. 166, 170.

C. A.
1930
GRANT
v.
EDMONDSON.
Romer L.J.

favourable way in which it could be put. Could it have been properly put in that way, then, if the Lord Justice had approved of Lord Holt's dictum as to the running of the benefit, his decision upon that point would have been in favour of the appellant. Moreover, the case of *Milnes* v. *Branch* (1) had been cited in argument, and it is inconceivable that the Lord Justice would have expressed the view that the benefit of a covenant can run with a rentcharge without making some reference to that case.

For these reasons I have come to the conclusion that the benefit of the covenant in the present case has not run with the rentcharge so as to be enforceable by the appellants. In so holding, I am glad to think that I am in agreement, not only with Clauson J., but with the opinion entertained by the large majority of the writers of text-books past and present.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Grover, Humphreys & Boyes; Hatchett Jones & Co., for Withington, Petty & Boutflower, Manchester.*

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(1) 5 M. & S. 411.

H. C. G.

LOCK *v.* BELL.

MAUGHAM J.

1930

Feb. 20, 21.

[1929. L. 741.]

Vendor and Purchaser—Contract for Sale of Interest in licensed Premises—Completion "on or about"—Construction of Contract in Law and in Equity in regard to Time—Time of the Essence of the Contract—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 7—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 41.

By a contract dated October 19, 1928, the plaintiff agreed to sell to the defendant all her right, title, and interest in a licensed house known as The Thorns of which she was the licensee. The contract provided that the purchase money should be paid "on or about" November 10, 1928, and that the defendant should forfeit the deposit of 120*l.* which he had paid if he should fail to fulfil his part of the contract; also that either party refusing to comply with or neglecting to perform any part of the agreement should pay to the other, on demand, the sum of 200*l.* On October 3, 1928, the defendant had given to the brewers who were the freeholders of The Thorns references which they had accepted by October 10. He went to the magistrates' clerk and signed the ordinary notices on reference to a request for a temporary transfer on November 10, and for full transfer on December 8. At least a week before November 10 the defendant knew that he would be unable to complete the purchase of The Thorns unless he could raise a loan. His brokers acting in the matter sent him a notice to attend on November 10. He did so, and first saw the brewers, telling them that he could not complete, and that the notice of application for transfer would have to be withdrawn and another one given. He then arranged with the plaintiff that completion should take place on December 8. The defendant, however, did not attend to complete. On December 22 the defendant stated that he would complete on January 30. In an action by the plaintiff for a declaration that the contract had been rescinded and the deposit of 120*l.* forfeited, and for damages:—

Held, (i.) that, in the circumstances, and particularly having regard to the subject-matter, time was of the essence of the contract.

(ii.) that under the terms of the contract, the sum of 200*l.* damages was in the nature of a penalty, and therefore not recoverable.

Observations on the question of time being of the essence of a contract.

Coslake v. *Till* (1826) 1 Russ. 376; *Tilley* v. *Thomas* (1867) L. R. 3 Ch. 61; *Stickney* v. *Keeble* [1915] A. C. 386; and *Bradley* v. *Walsh* (1903) 88 L. T. 737 followed.

ACTION.

The following statement of the facts is taken in substance from the judgment:—

By a contract dated October 19, 1928, and made between Rosa Lock (hereinafter called "the plaintiff"), as the executrix of her husband, Hart Lock, she being then resident, where her husband had been the licensee before her, at The Thorns Public House, Horley, in the county of Surrey, and Arthur Bell (hereinafter called "the defendant"), at that time the licensee of the Crown Hotel, High Street, Chesham, Buckinghamshire, the plaintiff agreed to sell "all her right, title, and interest of the house and premises now in her possession known by the sign of The Thorns, for the sum of 1200*l.*, the consideration agreed for such interest, and the goodwill of trade, and the trade, furniture, fixtures, and effects which she may have a right to sell as per inventory to be made as therein mentioned." She also agreed "to assign over good and sufficient beer and other licenses, on being paid for the time unexpired therein; likewise the sound and saleable stock in trade, consisting of ale and beer, wines, spirits and compounds not exceeding the value of 150*l.* by gauge and valuation of two licensed gaugers or their umpire; such gauge and time of delivering up possession of the premises shall be on or about November 10, 1928, at which time all rents, rates and taxes, and gaslight rent shall be cleared up, or an allowance made for the same": and the plaintiff agreed that she would "do all acts required for duly transferring the said licenses to the purchaser." Secondly, the defendant agreed "to accept the said house and premises, having a good title to the licenses and pay unto" (the plaintiff) "the price or sum above mentioned for her interest in the said houses and premises, and the goodwill of the trade, and the trade furniture, fixtures, fittings, and utensils, with the stock in trade as aforesaid; and that such gauge and time of taking possession shall be on or about November 10, 1928, at which time the purchase money shall be paid." Then followed a proviso that if "the said purchaser is not accepted by Messrs. Mellersh and Neale Limited"—who were the freehold brewers to whom the house belonged—"as tenant at the annual rent of 100*l.*, subject to the usual tenant's agreement, the deposit to be returned, and this agreement void." The agreement continued: "And as earnest of this agreement the purchaser has paid into the hands of the vendor's agents as stakeholders the sum of 120*l*."—i.e., 10 per cent. of 1200*l*. —"which is to be allowed in part of payment at the completion of this agreement; but if the vendor should not fulfil the same on her part she shall return the deposit in addition to the damages hereinafter stated. And if the purchaser should fail to fulfil his part of the agreement, then the deposit money shall become forfeited in part of the following damages; and if either of the said parties should neglect to perform or refuse to comply with any part of this agreement, the party so refusing or neglecting shall pay to the other of them, on demand, the sum of 200*l*., hereby mutually agreed upon to be the damages ascertained and fixed on breach thereof:" and the agreement concluded: "It is further agreed by the vendor that she will not take, keep, be interested or concerned in any licensed house, or any house for the sale of spirits, malt, or excisable liquors during the occupancy of the purchaser or his widow within the distance of three miles to be measured by the nearest highway from the within-named premises without returning the sum of 200*l*., being part of such purchase money."

This contract was on a printed form, the form commonly adopted by brewers' valuers in Surrey: and the only important departure from the print was that, instead of the words "on or before the date fixed for completion" standing unaltered, the word "before" was struck out, and the word "about" was substituted, so that the contract was for possession to be given, and completion to take place, "on or about November 10, 1928."

The defendant, as the plaintiff was aware, was intending to sell his interest in the Crown Hotel, Chesham, and hoped to sell it at an early date and thereby to obtain a portion of the money that he had to pay on the purchase of The Thorns. He came to see The Thorns, liked it, and thought that he would apply for it. On the same day, he went to the brewers, who approved of him subject to the giving of certain references. By October 3, 1928, he had given the references, and by October 10, 1928, they had been accepted, so that there was no question, before the date of the agreement—October 19—

that he had been accepted by the brewers as tenant at the annual rent of 100*l.*; and on the date fixed for completion nothing remained to be done save to pay the sum mentioned in the agreement and to transfer the licences on that date. Temporary transfers could be arranged every week: and there was no difficulty in obtaining, before the Reigate bench of magistrates, a temporary transfer on November 10 following, it being known that the magistrates met for the purpose of a complete and final transfer on December 8 following, which was one of their regular transfer days. In connection with the change, the defendant had appointed a firm of Messrs. Brown & Son to be his brokers, and the plaintiff a firm of Messrs. J. & W. Johnson to be hers. The defendant went to the magistrate's clerk at the Court House, Reigate, and there signed the ordinary notices in reference to a request for a temporary transfer of the licences on November 10, and for the full transfer on December 8, each date being a Saturday. The matter then seemed ripe for completion on the first day (being the day actually mentioned in the contract as the date "on or about" which completion should take place), and formal letters passed between the parties in reference to that date. On October 10, the brewers wrote to the plaintiff's solicitors: "We have now received satisfactory references regarding Mr. Bell, and the temporary transfer will take place on the date mentioned in our letter of the 8th inst." (that was November 10, following). A similar letter was written to the defendant himself by the brewers. They informed him that they had received satisfactory references, and they went on to say: "We understand that our representative informed you when you called here the other day that the temporary transfer was fixed for Saturday, November 10 next." There was then no statement to them that completion would not take place on that date. The gentleman between whom and the defendant there were negotiations with reference to the sale of the Crown Hotel broke off those negotiations at a date not definitely established, and at least seven days before November 10, the defendant became aware that he would not be in a position to find the money, unless he could borrow it, or a sufficient portion of it, before November 10. He received a notice from Mr. Brown to attend on November 10. Mr. Brown wrote to Messrs. Johnson that his firm had advised their client to attend on November 10 at the Court House, Reigate, for the purpose of applying for the temporary transfer, and to attend at the brewery at 12 o'clock for the purpose of the change, i.e., for the completion of the purchase. On November 9 or 10, however, the defendant came to Horley and first saw the brewers, and told Mr. Neale—of the brewers' firm—that he was not in a position to complete; he said that it was very unfortunate, and that the notice of the application for the transfer would have to be withdrawn and another one given. He then went to see the plaintiff, who was somewhat upset at finding that the completion would not take place at the date fixed. But she was very anxious not to be hard upon the defendant, and, although she had removed her furniture from the house, and had had an offer of a situation which she wanted to take as soon as she could get away from the house, she told the defendant that she did not mind waiting a day, and also said that she would even wait one month. According to her evidence the date of the change was fixed for December 8, and the defendant said that he would come in (i.e., that he would complete and take over the premises) on that date. On November 10, the defendant wrote to Mr. Neale a letter in which he said, "I saw Mrs. Lock and she is quite willing to stop on until I have disposed of this house, which I hope will take only a few weeks, so that the date you mentioned in December should be quite in order." He thought that December 8 would be the right date, and a date at which he could undoubtedly complete. On November 26 Messrs. J. & W. Johnson wrote to the brewers: "We now understand from Mr. Brown, the broker representing Mr. Bell, that he will be in a position to complete his purchase on transfer day, December 8 next." Evidence was given by a member of the firm of Messrs. J. & W. Johnson that Mr. Brown did in fact tell him that the defendant would be in a position to complete on December 8 following. That was acknowledged on November 27 by the brewers, who on the same day wrote to the defendant: "We have received notification from Messrs. John & Walter Johnson & Company, the brokers acting for Mrs. Lock, that you are now in a position to complete the purchase of the above on the transfer day December 8 next. We shall be glad if you will notify us if this information is correct." To that no answer whatever was given.

The fresh negotiations for the sale of the Crown Hotel, Chesham, broke down at some date at least a week before the end of December. The defendant did not communicate with the various parties, and when the date came he had to tell the brewers that he was unable to complete. The plaintiff had come to attend the completion, and, although she had been warned on the previous day that the defendant was not going to complete, she attended at the brewery with a member of her brokers' firm. On December 12, the brewers wrote to Mr. Bell: "As we have on two occasions had to withdraw application for the transfer of the licence to you from Mrs. Lock of The Thorns in Horley, we take it that you are not in a position to complete. We are therefore negotiating with another applicant for the house who we think would make a desirable tenant, and shall possibly accept him." Mr. Bell, on receipt of that letter, which reached him while he was suffering from influenza and was in bed, said: "There is an end of The Thorns." He did not write, he took no step, he did not telegraph to say that he would complete in a day or two. On December 14, the brewers wrote again to him: "We shall be glad if you will call here on Monday next, 17th inst., between 11 A.M. and 12 noon, for the purpose of discussing matters in connection with The Thorns P. H., Horley." Mr. Neale, in evidence, said that he did not in any way intend by that letter to say that he was still hoping in time for completion. The day passed, the 17th was a Monday, and the defendant did not appear; but on the 18th he telegraphed: "Regret confined with influenza, hope to be able to see you within few days, Bell." On December 20, Messrs. J. & W. Johnson wrote a letter stating that, Mr. Arthur Bell having neglected to perform his part of the agreement, the deposit of 120*l*. became forfeited, and they asked for the balance of 80*l*., being the balance of the 200*l*. damages mentioned in the agreement, to be handed to them. On December 22, the defendant wrote to the brewers: "Concerning my telegram, I wish to express my regret being unable to call upon you on Monday. I had been several days in bed and got as far as London and had to turn back. I have now definitely arranged for the change of this house for January 30. I am most anxious to take over The Thorns, and I shall be pleased to come and see you at any time convenient to yourselves." That letter was dated December 22. January 30 was five weeks later. The brewers would not continue with the matter. They had accepted the defendant as a tenant presuming that he would carry out his bargain. He had not carried it out, and they said that they were unwilling to negotiate with him any longer, and accepted as tenant a Mr. Hampton, whom they had first seen the previous September. The result was that at a date in January the house was handed over to Mr. Hampton, who completed purchase without a written agreement at the price of 1200*l*., and on April 29 the writ in this action was issued on behalf of the plaintiff, claiming a declaration that the contract of October 19 had been rescinded, and the deposit of 120*l*. paid by the defendant thereunder forfeited to the plaintiff by reason of the failure of the defendant to fulfil that contract and claiming also damages.

J. Norman Daynes for the plaintiff. From the beginning time was of the essence of the contract for sale. That contract provided that completion should be "on or about" November 10, 1928, which date, in accordance with the custom and usage of brewery valuers, was fixed and agreed as the date for completion by two letters, one of which so described it, and the other of which gave the defendant notice to attend to apply for the temporary transfer. Ultimately December 8 was agreed upon, and became of the essence of the contract for sale. The defendant's claim to have been entitled to postpone completion until after January 30, 1929, is unfounded.

G. D. Johnston for the defendant. It cannot be contended that time was of the essence of the contract. At an interview on November 8, 1928, it was agreed that completion should not take place till December 8, 1928. The plaintiff said that she would wait until the defendant was ready. The brewers' valuers were not authorized to fix November 10, 1928, as the date for completion, and in fact they did not. Further, only with the plaintiff's consent could the brewers themselves have accepted another tenant of the property instead of her, and the result of her having given that consent was that she herself could not carry out the contract.

MAUGHAM J. [having stated the facts :] The only difference between the evidence of the plaintiff and the defendant is that the defendant denies that he made a definite arrangement that completion would take place on December 8, 1928, although he agrees that the plaintiff said that she would wait one month, and I do not understand that he can pledge himself to the view that anything except that alteration was agreed upon. I hold that the plaintiff's evidence on this matter is conclusive. It is borne out completely by the whole of the rest of the evidence, and by the letters that passed between the parties, including the letter signed by the defendant himself. Accordingly, I have not the smallest doubt that I am bound to infer that December 8, 1928, was fixed as the result of a concession by the plaintiff to the defendant and with the defendant's consent, and that the defendant agreed to complete the purchase on that date.

The first question is whether, in such a contract as this, time is, I will not say " of the essence of " the contract, but " essential in " the contract. The contract is for the sale of the interest in a public house which was being carried on by a widow who was exceedingly anxious to get rid of it, and the contract involves, of course, a transfer of the business as a going concern, the business being one which depends largely on the powers of management of the licensee; and prima facie there is no doubt whatever that in a contract of that kind, time is of the essence of the contract. That was held to be the case in *Coslake* v. *Till* (1) by the then Master of the Rolls (Lord Gifford), and I do not think that anybody has ever doubted that that was right. Stock is, of course, of a fluctuating kind, and the subject-matter of the contract is in its very nature exposed to daily variation, as stated in the judgment in that case. But it is said in the present case that the contract is not for completion " on or before " November 10, 1928, but " on or about " that date. What difference does that make ?

I think that the legal position is somewhat obscured by the fact that the well known section of the Judicature Act, now s. 41 of the Law of Property Act, 1925. (2) Sect. 41 is expressed in such terms that one would suppose at first sight, unless previously instructed in the matter, that a court of equity construes a contract in reference to time in a way different from that in which a court of law construes it. It has, however, been held by the House of Lords in *Stickney* v. *Keeble* (3), following *Tilley* v. *Thomas* (4), that the legal construction of a contract in regard to time must in equity be the same as in a court of law. Before the Judicature Act, 1873, the real difference between the court of law and the court of equity was that the court of equity was accustomed to relieve against a failure to keep the date assigned by such a contract for either completion or steps towards completion, if it could do justice between the parties. If an action on the contract had been brought at common law before the Judicature Act, 1873, and the case was one in which the court of equity was being (properly) asked to grant specific performance, the court of equity would restrain proceedings at common law. There is in the case of *Stickney* v. *Keeble* (3) a most illuminating judgment by Lord Parker of Waddington. I will not cite from it at present, but it shows very clearly that, in truth, in considering such a case as the present, where the claim is merely to recover a deposit and damages, the view of the common law court with regard to the agreement must prevail in equity unless the case is such that equity would disregard the stipulations as to time and would restrain an action at law based on a breach of the contract.

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(1) 1 Russ. 376.

(2) Sect. 41: " Stipulations in a contract, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules."

(3) [1915] A. C. 386.

(4) L. R. 3 Ch. 61.

I am satisfied that, in such a case as the present, it would be quite wrong for a court of equity to restrain the legal consequences of the contract according to its true construction. Its construction must be that completion must take place by the date mentioned, or within a very short time thereafter. Accordingly, I think that, having regard to the subject-matter of the contract, time must be regarded as essential in this respect, and the circumstance that a little latitude is to be given with regard to the precise day does not really affect the matter, provided that the necessary latitude, or the proper latitude, whatever it may be, has been afforded to the purchaser. On that ground alone, therefore, I should be of opinion that a court of equity here is in a position no different from that in which a court of common law would have been before the Judicature Act, 1873, and that I have to consider the matter as it would have been considered had it arisen in the Court of Common Pleas or in the Queen's Bench before that Act was in force. In that case I should have to bear in mind that the contract was not completed "on or about" November 10, and that, accordingly, the deposit must be forfeited.

I would add, having regard to what took place between the plaintiff and the defendant on November 9, to the subsequent acts of the defendant and his agent, Mr. Brown, and to the circumstance that December 8 was definitely fixed for the completion of the transfer and of the change, that the parties have, and in particular the defendant has, definitely fixed December 8 as the date for completion, and that any doubt that might have arisen with regard to the true interpretation of the words, "on or about November 10," has been entirely removed. It is not perhaps a case where the plaintiff has made time of the essence of the contract, where it was not previously of the essence by virtue of a specific notice, but it amounts to the same thing. It is not, I think, necessary in such a case that there should be anything more than the offer by the vendor of a certain delay—in this case one month—acceptance of that delay by the purchaser as sufficient for his purpose, and the fixing of the time at a particular date—in this case December 8—by mutual agreement. If those facts be considered together with the circumstances and with the subject-matter of the contract, there can in my opinion be no doubt that thereafter December 8 became a date "essential" to the contract. Accordingly, I am of opinion that the sale agreement has come to an end, and that the deposit of 120*l*. has been forfeited to the plaintiff.

There remains the question of damages. It is contended that the contract clearly fixed the sum of 200*l*. as the damages payable on breach of contract. On the other hand, it is to be noted that this is expressed to be damages on the failure of either of the parties to perform or to comply with any part of the contract. There are several examples which might be given of the different effect produced by neglect to perform the contract. A curious example is that the vendor might neglect to perform it by some wholly trivial breach of the covenant against being interested or concerned in any licensed house within three miles. On the other hand, the purchaser might fail to perform it by neglecting to take over and pay for the stock in trade. There might be some trivial breach with regard to that covenant. I have, however, the advantage of a decision of the Divisional Court in *Bradley* v. *Walsh* (1), which I am unable to distinguish from the present case. There, as here, there was an agreement for the sale of licensed premises, which appears to have been in almost the same form as that with which I have now to deal. There also it was provided that if either of the said parties should neglect to perform or refuse to comply with any part of the agreement, the party refusing or neglecting should pay to the other a

(1) 88 L. T. 737.

sum (in that case 25*l.*) as liquidated damages. It was held that that was a penalty, and accordingly was a sum which could not be claimed by the plaintiff by reason of the breach of the agreement. I shall follow that case, and must therefore decide that the sum of 200*l.* is not damages which can be recovered, but is in the nature of a penalty which the plaintiff cannot recover. Accordingly, while declaring that the sale agreement has been rescinded and the deposit of 120*l.* forfeited, I will add, at the plaintiff's request, an order for an inquiry as to the damages, if any, suffered by reason of the breach of the sale agreement by the defendant in excess of the sum of 120*l.*, and the defendant must pay the costs of the action.

Solicitors: *Moon, Gilks & Moon*; *Arthur S. Joseph & Co.*

K. R. A. H.

MAUGHAM J.
1930
April 1, 3;
June 4.

In re THE NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED.

[00375 of 1922.]

Company—Winding-up—Insurance Companies—Participation Agreements (Inwards Treaty and Outwards Treaty)—No stamped Policies under Agreements—Winding-up of one Company—Proof by other—Alleged Payments of Premiums under Outwards Treaty subject to Deductions under Inwards Treaty—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 92, 93, 97—*Marine Insurance Act,* 1906 (6 *Edw.* 7, *c.* 41), *s.* 84.

In 1920 the E. company and the Y. company entered into a participation agreement effective as from January 1, 1920, which was a reinsurance treaty binding the E. company to cede and the Y. company to accept a participation of all risks therein mentioned of the share retained by the E. company accepted after January 1, 1920. In September, 1921, the E. company arranged that the N. company should take over the Y. company's position as from January 1, 1920: and in January, 1922, an agreement (hereinafter called "the Outwards Treaty") on the same lines and with the same provisions as those of the agreement with the Y. company was entered into between the E. company and the N. company. In 1921 the N. company and the E. company entered into another participation agreement (hereinafter called "the Inwards Treaty"), the N. company ceding and the E. company accepting a share of all marine risks. The Inwards Treaty had no provisions for the issuing of policies, or for particulars sufficient to make possible the issuing of policies, to satisfy the provisions of the Stamp Act, 1891, and the Marine Insurance Act, 1906. No stamped policies were in fact issued under any of the three agreements, and no premiums were ever actually paid to the N. company, which was credited with the proper proportion of the net premiums received by the E. company. On the compulsory winding-up of the N. company the E. company claimed to be entitled to prove for sums paid by it for premiums under the Outwards Treaty, after allowing for sums paid or credited to it by the N. company under the Inwards Treaty. The Official Receiver rejected the claim on the ground that both treaties were invalid and inadmissible in evidence, because they were contracts of marine insurance which did not comply with the requirements of the Stamp Act, 1891, and the Marine Insurance Act, 1906, and were unlawful: and upon a summons asking for an order that the proof should be allowed:—

Held, (i.) that, as the Outwards Treaty was invalid and void, the entries of premiums to the credit of the E. company were not evidence of payment, and therefore no claim under s. 84 of the Marine Insurance Act, 1906, could be made.

(ii.) that even if premiums had been paid such a claim could not have been made, as ss. 92, 93, and 97 of the Stamp Act, 1891, amounted to an implied prohibition of offences by incurring liability for premiums in respect of unstamped sea insurances, and there had therefore been "illegality" on the part of the E. company, with the result that a claim for return of premiums under s. 84 of the Marine Insurance Act, 1906, must fail.

(iii.) that money paid by the E. company upon the N. company's taking over the reinsurance treaty with the Y. company could not be recovered on the ground of total failure of consideration, as both parties knew that a continuous breach of the law was contemplated, and as the treaty, assuming it to be illegal, had been partially carried into effect.

Bensley v. *Bignold* (1822) 5 B. & Ald. 335; *Cope* v. *Rowlands* (1836) 2 M. & W. 149; *Brightman & Co., Ld.* v. *Tate* [1919] 1 K. B. 463; and *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742 followed.

Smith v. *Mawhood* (1845) 14 M. & W. 452 distinguished.

SUMMONS.

The following statement of facts is taken from his Lordship's considered judgment:—

By a summons dated December 20, 1928, the English Insurance Company, Ld., seeks for an order that the decision of the Senior Official Receiver dated December 1, 1928, rejecting the proof of the English Insurance Company be reversed. The claim of the English Insurance Company was for repayment of premiums paid or alleged to have been paid under a " participation agreement " whereby the National Benefit Assurance Company, Ld. (whom I shall call " the National Company "), became reinsurers of certain marine risks underwritten by the English Insurance Company after allowing certain deductions under another participation agreement. The Official Receiver rejected the claim on the ground that both the participation agreements were invalid and inadmissible in evidence, because they were contracts of marine insurance which did not comply with the requirements of the Stamp Act, 1891, and the Marine Insurance Act, 1906, and were unlawful. The first claim is based by the English Insurance Company upon s. 84 of the Marine Insurance Act, 1906, which contains this provision : " Where the consideration for the payment of the premium totally fails and there has been no fraud or illegality on the part of the assured or his agents the premium is thereupon returnable to the assured." The main question between the parties is therefore whether, assuming premiums have been paid, there has been " illegality " on the part of the assured ; for, if so, that will displace the claim under that section.

The facts are not in dispute. The English Insurance Company is an insurance company, as its name implies ; and the National Company until it was wound up was also an insurance company. In the year 1920 the English Company entered into a participation agreement with the London and Yorkshire Marine and General Insurance Company, Ld., such agreement having effect as from January 1, 1920. This was a reinsurance treaty in a form which has on various occasions been considered by the Courts. The English Company was bound to cede and the Yorkshire Company became bound to accept a certain participation of all and every risk therein mentioned upon any marine insurance. The participation was to be equal to 50 per cent. of the share retained by the English Company accepted after January 1, 1920, with a certain maximum. The liability of the Yorkshire

Company was to commence at the same time as that of the English Company. By Article 4 the English Company was not obliged to furnish any particulars with regard to risks accepted, and the Yorkshire Company was entitled to receive monthly statements of premiums and losses only. By Article 5 the Yorkshire Company was to be entitled to a proportionate part of net premiums as therein mentioned. Under Article 7 the English Insurance Company was to have certain commissions. By Article 8 a statement of account between the parties was to be rendered monthly by the English Company. Balances in favour of the Yorkshire Company were to be paid into a special account to be opened in the joint names of the parties. The joint account (it was stated) had already been opened by the deposit of 10,000*l.*, in approved securities paid into it by the Yorkshire Company, and the latter agreed that it would make a like deposit of a further sum of 10,000*l.* on or before December 31, 1930. Sums were not to be disbursed from the joint account except on the authority of the English Company. By Article 11 provision was made for an arbitration. The arbitrators were expressly relieved from all judicial formalities, and it was stated that they might abstain from following "the strict rule of law."

Business was done under that agreement, and a separate account was opened in the joint names of the companies into which was paid the share of premiums payable to the Yorkshire Company, and out of which there was paid, as and when ascertained, the share of losses of the Yorkshire Company. In September, 1921, it was arranged between the English Company and the National Company that the National Company should take over the position of the Yorkshire Company as from January 1, 1920. In January, 1922, a new agreement was entered into between the English Company and the National Company. This agreement, which again is styled a "participation agreement," is on precisely the same lines and contains the same provisions as those which I have outlined in the case of the agreement with the Yorkshire Company. It is again an "Outwards

BIBL. LONDIN. UNIV.

Treaty" from the point of view of the English Company, since it provides for cessions by the English Company to the National Company. It is only necessary to add that under Article 5 of such agreement the National Company was expressed to be entitled to a proportionate part of the net premiums received by the English Company, and was of course to bear its proportionate share of all losses. Article 8 provided for a statement of account between the parties to be rendered quarterly by the English Company to the National Company. It was to include all premiums on risks closed and losses paid within the period embraced by the statement of account (apart from certain losses therein mentioned), and the credit or debit balance of account as the case might be was to be paid in sterling to or by the company within fifteen days after the account had been rendered and confirmed. It appears from a letter dated September 23, 1921, written on behalf of the National Company, that as part of the arrangement it had been previously agreed (on September 23, 1921) that the amount then standing at the bank to the credit of the joint account above referred to should be paid over to the National Company ; and that it was on those terms that the National Company "agreed to accept the contract" from the English Company. Accordingly, on September 23, 1921, there was forwarded to the National Company a cheque for 19,697*l.* 18*s.* 5*d.*, being the amount standing to the credit of the deposit account, and on September 26, 1921, a further small balance amounting to 950*l.* 13*s.* 4*d.* was also paid by cheque to the National Company.

No precise evidence has been given as to the nature of the arrangement between the National Company and the Yorkshire Company which resulted in the National Company accepting the position of the Yorkshire Company as from January 1, 1920, and entering into the treaty of January, 1922. It is however clear that the two cheques in question, 19,697*l.* 18*s.* 5*d.* and 950*l.* 13*s.* 4*d.*, making in all a sum of 20,648*l.* 11*s.* 9*d.*, represented the balance of net premiums over losses and outgoings to date. The fact appears from an account rendered by Messrs. Livesay, Hawthorn & Manby to the

National Company, and from certain correspondence put in since the hearing by consent. It appears that in fact no deposit of securities was made under Article 8 of the treaty of 1920; but in lieu thereof a current account had been opened in the joint names of the two companies.

In the year 1921 the National Company and the English Company entered into another and a different participation agreement; but on this occasion it was an "Inwards Treaty," as it is called, instead of an Outwards Treaty. The National Company agreed and undertook to cede to the English Company and the latter agreed to accept a certain share of all marine risks undertaken by the National Company with a certain maximum. This again is an ordinary reinsurance treaty which came into force as from January 1, 1921. It provided for quarterly accounts in the usual way. It contained no provision whatever for policies of insurance being issued, nor any provision for particulars sufficient to enable the policies of reinsurance to be issued to satisfy the provisions of the Stamp Act, 1891, and of the Marine Insurance Act, 1906. No policies were in fact issued under any of the three agreements that I have mentioned, and, as will be explained, each of them was invalid by the express terms of s. 93 of the Stamp Act, 1891.

On July 25, 1922, the National Company was ordered to be wound up by the Court. The English Company claim that they are entitled to prove in the liquidation for the sums paid by them for premiums under the Outwards Treaty; and they concede, I think as a matter of grace rather than law, that in that event the National Company is entitled to set off against their claim the losses paid by the National Company under the same treaty, and the premiums paid to the English Company under the Inwards Treaty. The primary claim of the English Company is thus a claim for a return of premiums alleged to have been paid by the English Company to the National Company in respect of the proportions of risks of which the National Company were reinsurers. The pecuniary position is as follows:—

There has been paid or credited by the National Company to the English Company in respect of risks falling within the Outwards Treaty sums as follows :—

	£	s.	d.
February 3, 1922	£3110	17	0
May 19, 1922	1500	0	0
June 14, 1922	1000	0	0
	£5610	17	0

The excess of the sums paid over those received in respect of the Outwards Treaty—namely, 20,648*l.* 11*s.* 9*d.*, is accordingly 15,037*l.* 14*s.*

The following sums were paid or credited to the English Company by the National Company under the Inwards Treaty :—

	£	s.	d.
October 29, 1921	£1000	0	0
October 31, 1921	1492	8	11
December 6, 1921	4987	10	5
April 7, 1922	2376	0	4
May 19, 1922	681	18	10
	£10,537	18	6

The English Company seeks to prove for the difference between the sum of 15,037*l.* 14*s.* and the sum of 10,537*l.* 18*s.* 6*d.* which it is conceded that the National Company is entitled to set off against the larger sum.

S. L. Porter K.C. and *A. Andrewes-Uthwatt* for the applicant company. The Court has not determined that, in the circumstances that are present in this case, there is " illegality " in the strict sense of the word : *In re Home and Colonial Insurance Co.* (1) ; *In re London County Commercial Reinsurance Office* (2) ; *Joseph Evans & Co.* v. *Heathcote.* (3) A contract void within the meaning of the Marine Insurance Act, 1906, is not necessarily illegal. There is a distinction between void and illegal in s. 84 of the Act. (1) [They referred also to *The Barrow Mutual Ship Insurance Co.* v. *Ashburner.* (2)] In this class of action it is not illegal or criminal acts, but only invalid acts, that are dealt with.

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(1) [1930] 1 Ch. 102, 127, 128. (2) [1922] 2 Ch. 67, 68, 84.
(3) [1918] 1 K. B. 418, 426.

C. R. Dunlop K.C. and *L. W. Byrne* for the Official Receiver. If anything has here been done which comes within the words "fraud or illegality," nothing can be recovered by the applicant. This is not a case where, under the terms of the Act, there has been no "fraud or illegality on the part of the assured." The consideration for payment of the premium cannot be said totally to have failed. There cannot be said to have been no illegality when there has been an offence within the Stamp Act, 1891.

[They referred to *Stokes* v. *Twitchen.* (3)]

S. L. Porter K.C. in reply. It is said that the effect of putting one sum against another is to prevent a claim being made in respect of the sum paid. The question is whether the book entry is a payment in law or is merely an accord and satisfaction. That, provided that money is owing, is just as much a payment as if money had been handed over and handed back: *Callander* v. *Howard.* (4)

Cur. adv. vult.

June 4. MAUGHAM J. [having stated the facts as set out above:] The participation agreement or, as I shall call it, the reinsurance treaty of January, 1922, is plainly a contract for sea insurance within the meaning of ss. 92 and 93 of the Stamp Act, 1891, since it is a contract for reinsurance upon ships or vessels and other marine risks (s. 92, sub-s. 1). (5)

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(1) Sect. 84, sub-s. 3 (*a*): "Where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, provided that there has been no fraud or illegality on the part of the assured; but if the risk is not apportionable, and has once attached, the premium is not returnable."

(2) (1885) 54 L. J. (Q. B.) 377.

(3) (1818) 2 Moore, C. P. 538; 8 Taunt. 492.

(4) (1850) 10 C. B. 290.

(5) Sect. 92, sub-s. 1: "For the purposes of this Act the expression 'policy of sea insurance' means any insurance (including re-insurance) made upon any ship or vessel, or upon the machinery, tackle, or furniture of any ship or vessel, or upon any goods, merchandise, or property of any description whatever on board of any ship or vessel, or upon the freight of, or any other interest

MAUGHAM J.
1930
THE NATIONAL BENEFIT ASSURANCE CO., *In re.*

It is, accordingly, not itself valid. Policies of sea insurance might of course have been issued by the reinsurers as each risk was notified to them; but this was not done; and it seems clear that it was not intended, since Article 4 provides that the English Company " shall not be obliged to furnish " to the National Company any particulars in regard to risks, and that the latter is entitled only to receive monthly statements of premiums and losses. The matter does not

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which may be lawfully insured in or relating to, any ship or vessel, and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk, but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance."

Sub-s. 2: "Where any person, in consideration of any sum of money paid or to be paid for additional freight or otherwise, agrees to take upon himself any risk attending goods, merchandise, or property of any description whatever while on board of any ship or vessel, or engages to indemnify the owner of any such goods, merchandise, or property from any risk, loss, or damage, such agreement or engagement shall be deemed to be a contract for sea insurance."

Sect. 93, sub-s. 1: "A contract for sea insurance (other than such insurance as is referred to in the fifty-fifth section of the Merchant Shipping Act Amendment Act, 1862) shall not be valid unless the same is expressed in a policy of sea insurance."

Sub-s. 2: "No policy of sea insurance made for time shall be made for any time exceeding twelve months."

Sub-s. 3: "A policy of sea insurance shall not be valid unless it specifies the particular risk or adventure, the names of the subscribers or underwriters, and the sum or sums insured, and is made for a period not exceeding twelve months."

Sect. 97, sub-s. 1: "If any person (*a*) becomes an assurer upon any sea insurance, or enters into any contract for sea insurance, or directly or indirectly receives or contracts or takes credit in account for any premium or consideration for any sea insurance, or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

"(*b*) makes or effects, or knowingly procures to be made or effected, any sea insurance, or directly or indirectly gives or pays, or renders himself liable to pay, any premium, or consideration for any sea insurance, or enters into any contract for sea insurance, unless the insurance is expressed in a policy of sea insurance duly stamped, or

"(*c*) is concerned in any fraudulent contrivance or device, or is guilty of any wilful act, neglect, or omission, with intent to evade the duties payable on policies of sea insurance, or whereby the duties may be evaded,

he shall for every such offence incur a fine of one hundred pounds."

rest merely upon s. 93 of the Stamp Act; for the Legislature thought fit to impose penalties on any attempt to disregard that section and so to evade the payment of stamp duties. Under the provisions of s. 97 it is clear that both the English Company, as the assured, and the National Company, as the person who "directly or indirectly" received or contracted to receive or took "credit in account for any consideration for any sea insurance" or knowingly took upon themselves certain risks or rendered themselves liable to pay . . . . any sum of money upon any loss, peril or contingency relative to any sea insurance, (the insurance not being expressed in duly stamped policies) were respectively guilty of "offences" and became liable for every such offence to pay a fine of 100*l.* Having regard to these sections it is hardly necessary to consider the milder language of the Marine Insurance Act, 1906; but the provisions of ss. 22 to 27 of that Act should be remembered (see also *English Insurance Co.* v. *National Benefit Assurance Co.* (1) and *In re Home and Colonial Insurance Co.* (2), where the joint effect of the two statutes is considered). It follows that the reinsurance treaty in question is invalid, in other words, it is void; but it is argued that neither statute contains any express prohibition of any irregular contract of sea insurance, that there has been no "illegality on the part of the assured," and that premiums paid may accordingly be recovered by the English Company in virtue of the provisions of s. 84 of the Marine Insurance Act, 1906, above referred to. It will be noted that s. 84 applies only if the premiums have been actually paid by the assured to his insurer; and it may be observed that in the case of a reinsurance treaty in the modern form, the assured, in the first instance at any rate, does not pay premiums to the so-called participator who is his insurer. The ordinary course, and the course pursued in the present case in relation to the treaty of reinsurance of January, 1922, and to the previous agreements, was that the National Company was credited with its proper proportion of the net premiums received by the English Company (subject to certain

(1) [1929] A. C. 114.

(2) [1930] 1 Ch. 102, 128, 129.

deductions for commission) and became entitled to monthly statements of premiums and losses and to quarterly statements of account. The latter statements were to include all premiums on risks closed and losses paid, and the credit or debit balance of account as the case might be was to be paid in sterling to or by the National Company within fifteen days after the account had been rendered and confirmed. The English Company thus never actually paid any premiums to the National Company, and my opinion is that in such a case, regard being had to the circumstance that the reinsurance treaty is invalid and void, no claim under s. 84 can properly be made. The entries of premiums to the credit of the English Company made pursuant to a void agreement cannot, I think, be relied on as evidence of payment.

I have, however, also formed a view on the question of principle whether if premiums had been actually paid under a treaty of reinsurance, void for the reasons above stated, a claim under s. 84 would be admissible. This question depends on whether "there has been . . . . fraud or illegality on the part of the assured."

I have already pointed out that the "assured," in this case the English Company, is liable to a penalty for each offence in paying or rendering himself liable to pay premiums in respect of unstamped sea insurances. The question is whether, having regard to the penalty, the sections amount to an implied prohibition of each act and therefore to an illegality on the part of the English Insurance Company. I have come to the conclusion that they do. A somewhat similar point was raised in the case of *Bensley* v. *Bignold* (1), in which it was held that a printer could not recover for his work and materials when he had omitted to affix his name on the work as required (at that date by 39 Geo. 3, c. 79, s. 27). There was no express prohibition in the Act against the act of printing without adding the printer's name; but the Court, consisting of Abbott C.J. and Bayley, Holroyd and Best JJ., held that there was no sound distinction between those cases where a statute required a thing to be done and where it prohibits it being done. A similar view was taken by the Court of Exchequer in the important case of *Cope* v. *Rowlands* (1), where the question arose whether a broker could maintain an action for work and labour in buying and selling stock when he was not duly licensed pursuant to 6 Anne, c. 16. In delivering the judgment of the Court Parke B. observed: "It is perfectly well settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition," and he adds a very material sentence, that "it can make no difference in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object." The claim accordingly failed. A recent review of the cases and authorities on the point will be found in the judgment of McCardie J. in *Brightman & Co., Ld.* v. *Tate* (2), which renders it unnecessary for me to deal with them. I should add that there are a number of cases (of which *Smith* v. *Mawhood* (3) is a typical example) in which it has been held that the object of the Legislature was merely to collect revenue and that the statute did not, even by implication, prohibit the transaction. These cases however do not apply where there is expressly or by implication a statutory prohibition of the transaction: see Pollock on Contracts, 9th ed., pp. 362, 363.

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(1) 5 B. & Ald. 335.

There are, it is true, one or two observations in the judgment of Lord Esher in the case of *The Barrow Mutual Ship Insurance Co.* v. *Ashburner* (4) which may be thought to be in conflict with this view; but the case turned on the doctrine of estoppel and the passages are at most obiter on a point not argued and without a consideration of the authorities to which I have referred. It does not seem to me that consistently with those authorities I can come to any conclusion except that there has been "illegality" on the

(1) 2 M. & W. 149.
(2) [1919] 1 K. B. 463.
(3) 14 M. & W. 452.
(4) 54 L. J. (Q. B.) 377, 378, 379.

part of the assured, so that a claim under s. 84 of the Marine Insurance Act, 1906, cannot be maintained.

A further question arises whether, apart from s. 84, money actually paid by the English Company upon the reinsurance treaty with the Yorkshire Company being taken over by the National Company can be recovered on the ground of total failure of consideration. The general rule no doubt is that money paid under an unlawful agreement cannot be recovered back. The maxim applicable is "In pari delicto potior est condicio defendentis." Nothing turns upon the form of the pleadings or on the question who raises the point. As was said by Lord Mansfield in the well known case of *Holman* v. *Johnson* (1): "If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causâ, or the transgression of a positive law of this country, there the Court says he has no right to be assisted." In the case of *Harse* v. *Pearl Life Assurance Co.* (2) an action brought to recover premiums paid on policies of life insurance, void for want of any insurable interest in the assured, was dismissed on the ground that the parties were in pari delicto, and that although the insurance had been effected in reliance on a representation (assumed to have been made innocently) by the agent of the insurance company that the insurance would be valid. In my opinion the same principle must be applied here. Both parties must be taken to have been equally acquainted with the law and to have known in September, 1921, that a continuous breach of the law was in contemplation; and each party I think contemplated that the other would pay any sums due by reason of an honourable obligation to pay them, irrespective of any legal liability. Moreover, I think there is another ground on which the money paid to the company cannot be recovered back—namely, for the reason that the reinsurance treaty, assuming it to be an illegal one, has partially been carried into effect. The principle was established by the Court of Appeal in the case of *Kearley* v. *Thomson.* (3) In that case the defendants

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(1) (1775) 1 Cowp. 341, 343.

(2) [1904] 1 K. B. 558.

(3) 24 Q. B. D. 742.

MAUGHAM
J.

1930

THE
NATIONAL
BENEFIT
ASSURANCE
CO.,
In re.

were solicitors to the petitioning creditor in certain bankruptcy proceedings and had incurred costs which were to be paid out of the estate. The plaintiff offered to pay to the defendants a sum of money for these costs on their undertaking not to appear at the public examination of the bankrupt and not to oppose his order of discharge. The defendants agreed to this, received the money and did not appear at the public examination of the bankrupt, and before any application for the discharge of the bankrupt had been made the plaintiff brought an action to recover back the money. The judgment of the Court was delivered by Fry L.J. It was decided that the bargain was an illegal one and accordingly that the money had been paid under an illegal contract, which however had been partially carried into effect by reason of the fact that the solicitors did not appear at the public examination of the bankrupt. I find the following passage in the judgment of Fry L.J. (1): "I hold, therefore, that where there has been a partial carrying into effect of an illegal purpose in a substantial manner, it is impossible, though there remains something not performed, that the money paid under that illegal contract can be recovered back." In the present case the facts are that both parties continued to treat the two treaties as valid until the National Company went into liquidation. Quarterly statements of account were rendered on that footing and large payments were made, as stated in para. 9 of the agreed statement of facts. On this ground also I must come to the conclusion that the sums paid by the English Company to the National Company on the latter taking over the position of the Yorkshire Company are not recoverable. The summons must therefore be dismissed.

Solicitors: *Parker, Garrett & Co.; William A. Crump & Son.*

K. R. A. H.

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(1) 24 Q. B. D. 742, 747.

MAUGHAM J.
1930
Oct. 15.

T. M. FAIRCLOUGH AND SONS, LIMITED *v.* BERLINER.

[1929. T. 1848.]

Landlord and Tenant—Two joint Lessees—Breaches of repairing Covenants—Lessor's Action for Possession—Claim by one joint Lessee alone for Relief against Forfeiture—Meaning of "lessee"—Limitation of Amount of Damages—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 36, *sub-s.* 1; 146, *sub-s.* 2—*Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

Where joint lessees hold under a lease, no one of them alone is "the lessee" within the meaning of s. 146, sub-s. 2, of the Law of Property Act, 1925.

The company, as lessor, after serving a schedule of dilapidations and two notices on B. and L., who were joint lessees, brought this action, by which they sought, against both defendants, to recover possession of premises comprised in two leases. The leases contained full repairing covenants, which the defendants had neglected to perform. The defendants originally appeared by the same solicitors, and put in a defence signed by counsel on their behalf. But at the date of the hearing the defendant L. appeared by another counsel instructed by another firm, while B. did not instruct solicitors but appeared in person. L. asked for relief against the forfeiture under s. 146, sub-s. 2, of the Law of Property Act, 1925, B. did not desire such relief, preferring to give up possession.

Held, that relief against forfeiture, where there are joint lessees, cannot be granted on the application of only one of them.

ACTION.

By a lease dated July 12, 1921, and made between Frank Fairclough, Arthur Fairclough, Emma Constance Fairclough, Guy Thomas Morrison Fairclough, Dorothy Constance Le Lacheur, and Phyllis Mary Hussey (thereinafter called "the lessors"), of the first part, Premierland, Ld., of the second part, and Simon Diamond, of the third part, the lessors demised to Premierland, Ld., a plot of ground on the west side of Back Church Lane in the parish of St. Mary, Whitechapel, London, with the erections thereon and fixtures and fittings specified in the schedule to the said lease, and the right in common with the lessors to use certain passage ways, for the term of 10½ years from March 25, 1921, at a yearly rent of 730*l.* By a second lease dated July 12, 1921, and made between the same parties the lessors demised to Premierland, Ld., certain land on the east side of Gower's Walk in the parish of St. Mary, Whitechapel, and the right to use a certain gateway, entrance, and lavatories, for the term of 10½ years from March 25, 1921, at a yearly rent of 30*l*. By an assignment of both leases dated September 19, 1924, and made by the National Bank, Ld., which had become mortgagee of the said term of years, the term became vested in Victor Berliner (hereinafter called "the first defendant"), and Mark Emanuel Lyttlestone (hereinafter called "the second defendant").

By a deed dated August 22, 1927, and made between the said Frank Fairclough, Arthur Fairclough and Guy Thomas Morrison Fairclough of the first part, the said Emma Constance Fairclough, Guy Thomas Morrison Fairclough, Dorothy Constance Le Lacheur and Phyllis Mary Hussey of the second part, the said Frank Fairclough of the third part, Arthur Fairclough of the fourth part, Edward Hart, George Wellesley Drake, and Edward Tom Le Lacheur of the fifth part and T. M. Fairclough & Sons, Ld. (hereinafter called "the company"), of the sixth part, the lessors assigned to the company the said demised premises and all their title to and interest in the same and to and in the reversions dependent on the said terms, and the same thereon became and at the time of this action were vested in the company.

By each of the said leases Premierland, Ld., covenanted for themselves and their assigns at all times during the said terms well and substantially to repair, uphold, maintain, purge, cleanse, glaze, amend and keep repaired, upheld, maintained, purged, cleansed, glazed and amended the said demised premises, and to paint, whitewash, colour, and paper the same in the manner and at the times therein mentioned, and also within three calendar months after notice in writing from the lessors of any defects and wants of reparation to repair and make good the same according to such notice and the said covenants, and each of the said leases contained provisions for re-entry in case of any breach of the said covenants.

As early as the year 1926 the company or its predecessors began to complain of the neglect to perform the repairing covenants contained in the leases, and these complaints from time to time became more and more frequent. The defendants said that "they had a trying time" in 1928, and that "Premierland had been running at a loss." In November, 1928, the company instructed its surveyor to prepare a schedule of dilapidations for service. On November 8 of that year the defendants admitted that the matter had been overlooked, and referred to their financial difficulties. A notice and a schedule of dilapidations were served on January 15, 1929, the latter being of a very extensive character, requiring all sorts of dilapidations of a structural character to be made good. A further notice was served on June 11, 1929.

The defendants were either unwilling or unable really to comply with the urgent requests to get on with the matter. In November they got a contract for the doing of a very small portion of the repairs by a firm named Messrs. Brown & Co., Ld., but nothing was done as to the rest of the repairs, which were estimated on behalf of the company to require an expenditure well over 1000*l*. In the meantime the rent fell in arrear, and on November 21, 1929, the company commenced this action, which came on for trial in October, 1930, at a time when the defendants had done practically nothing except as regards the work or part of the work which Messrs. Brown & Co., Ld., contracted for; and evidence was given that, substantially, the premises were in very bad repair, both as regards the roof and the walls, and the heating apparatus, sanitary appliances, and so forth. The cost of putting these matters right would largely have exceeded the sum of 1000*l*. As regards the rent, there was at the time of the action due to Michaelmas, 1930—the rent being due in advance—a total sum of 968*l*. 17*s*. 9*d*. No rent was paid from midsummer, 1929. The rent was substantial, amounting to 760*l*. per annum.

The position therefore was that there was a good deal of evidence to show that the defendants, either because they were unable through lacking the pecuniary means, or because they were unwilling to do so, had completely declined to carry out, or had abstained from carrying out their duties under the covenants of the lease. A sum of 380*l.* was paid into Court in respect of the mesne profits; but something like 2000*l.* would have been required to comply with the obligations under the covenants of the leases, to pay the rent up to date, and to pay the costs of this action and of ascertaining precisely the amount due, and the fees of the surveyor, and other amounts incident to a case of the kind. At first both defendants appeared by solicitors, and their defence was signed by counsel. At the hearing, however, the first defendant appeared in person, and stated that he did not wish to claim relief against forfeiture, while, on behalf of the second defendant, a different firm of solicitors instructed another counsel.

G. R. Blanco White for the company. The leases contain full repairing covenants. The premises are in a very rough state, and there has been trouble in regard to repair from time to time. The damages which can be claimed are to some extent limited by s. 18 of the Landlord and Tenant Act, 1927 (1), as the plaintiff company intend to use the premises at the end of the lease as a garage.

E. W. S. Cox-Sinclair for the second defendant. It cannot be denied that there have been substantial dilapidations, of a kind which, but for s. 146, sub-s. 2, of the Law of Property Act, 1926 (2), would cause a forfeiture of the lease. If the contention that relief cannot be granted to one joint lessee alone were right, this remedial section would be liable to be defeated in all cases where a partner, by refusing to co-operate, may destroy the power of the others to obtain relief. Any lessee who may choose to do so may come to the Court and ask for relief, subject to the conditions imposed. Where there is a joint tenancy there must be a trust for sale: Law of Property Act, 1925, s. 36, sub-s. 1. (1) The words "beneficially entitled" may well apply where there is a limitation of a term of years. There was here a grant of a legal estate limited by the conditions of the lease. Having regard to the disputes between the two defendants, and to the fact that the second defendant has brought the action and could have cited the first defendant as a party, the Court ought not to feel obliged not to grant relief just because the first defendant has refused to join in the application for it.

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(1) Sect. 18, sub-s. 1: "No damage shall be recovered for a breach of any . . . . covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

(2) Sect. 146, sub-s. 2: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties

G. R. Blanco White in reply. In the circumstances the Court cannot grant relief under s. 146, sub-s. 2, of the Law of Property Act, 1925, and even if the Court had the power, the present case is not one in which that power ought to be exercised. The section might have said "a lessee": what it does say is "the lessee," and, the phrase "the lessee" being used, the section cannot apply where there are several lessees unless all of them apply for relief. The necessary application, therefore, has not been made. The Court cannot make a vesting order in the second defendant alone. All that it can do is to grant relief, and it ought not to grant it where there have been determined breaches of covenant and there are differences between the lessees.

under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

(1) Sect. 36, sub-s. 1: "Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held on trust for sale, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity."

MAUGHAM J. [having stated the facts :] There is, however, a singular feature which has been urged to-day, which I think makes it clear to me that I am not in a position here to grant any relief to the defendants—namely that the defendants, who originally appeared by solicitors, Messrs. Teff & Teff, and put in a defence signed by counsel on their behalf are not now appearing by those solicitors. The second defendant is appearing by Mr. Cox-Sinclair, who is instructed by another firm of solicitors ; but the first defendant has not instructed solicitors to appear on his behalf, and I have heard him in person. While the second defendant is anxious to have relief against the forfeiture which has been established in the present case—the relief being claimed under s. 146, sub-s. 2, of the Law of Property Act, 1925—the first defendant, on the other hand, told me frankly that he has no means sufficient to comply with his obligations under the leases, and that he is desirous that the whole thing should come to an end, and that he should have the advantage of the circumstance that the company is desirous of recovering possession of the premises, and thus limiting such liability as the defendants are under pursuant to the covenants of the leases.

The dilapidations have been proved by a surveyor who has been called on behalf of the plaintiffs, except that the exact amount has not yet been ascertained, that being a matter which will require some investigation, particularly having regard to the fact that the company admits that if it recovers possession it proposes to convert the premises into a garage or a machine shop, and that some of the repairs covered by the covenants in the leases would be rendered valueless if they were done. Accordingly, under s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, the damages for breaches of those covenants must be diminished by reason of the circumstances; but substantial breaches have been proved. Prima facie, therefore, it is clear that the company is entitled to assert that the two leases have been forfeited.

Counsel for the second defendant, under the provisions of s. 146, sub-s. 2, of the Law of Property Act, 1925, applies to the Court for relief. Two questions arise under that sub-section: first, can the second defendant, one of the two joint lessees, make such an application; secondly, if the application can be made, ought the Court, in its discretion, having regard to the proceedings and conduct of the parties under the provision of s. 146 of the Law of Property Act, 1925, and to the other circumstances of the case, to grant such relief? And a third question would arise, if relief can and ought to be granted, on what terms should the Court grant it?

It will be noted that under sub-s. 2 the phrase is. [His Lordship read the sub-section and continued:] In the present case in my judgment it is not accurate to say that the second defendant is the lessee. The lessees here are joint lessees—the first defendant and the second defendant. Sub-s. 5 of s. 146 of the Law of Property Act, 1925, states that "'Lessee' includes an original or derivative under-lessee, and the persons deriving title under a lessee"; but it does not in any way lead to the conclusion that if there are two or more joint lessees one of them can apply to the Court for relief; and there seems to me to be a very great objection to a provision which would enable him to apply to the Court, unless the provision also in some way enabled the Court in granting relief to absolve the other joint lessee from future liability. The section is a provision in the nature of an indulgence to be given to a lessee, or to several lessees who have not complied with their contractual obligations. The effect of granting relief under that sub-section is to restore the lease as though it had never been forfeited. That is the result of *Dendy* v. *Evans.* (1)

Accordingly, if I were to accede to the application on behalf of the second defendant, the result would be that the first defendant would continue to be liable under the onerous covenants contained in these leases, including the onerous obligation to pay rent up to the termination of the leases without, it may be, any prospect of being able to recoup himself by the use of the premises. In my opinion, s. 146, sub-s. 2, can be applied in the present case only upon the application of the two joint lessees, and, no such application having been made, it seems to me that the Court has no jurisdiction to grant relief.

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(1) [1910] 1 K. B. 263.

I would, however, add that, having regard to the circumstance that one only of the joint lessees wishes to have relief, and to the conduct of the parties I should in any case have come to the conclusion that, if I had a right to grant such relief, I ought in my discretion to refuse it.

In these circumstances the company has a right to an order for possession of the premises and to an inquiry as to damages sustained by it by reason of the breaches of the covenants, regard being had to the provisions of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, and I think that it would be convenient if the order contained an admission on behalf of the company that it proposes after the termination of the tenancy to convert the premises into a machine shop for an extension of its existing garage. That will render it unnecessary for the person, whoever he may be, who takes the inquiry, to have evidence on that point. The company will also be entitled to an order for the payment out of Court of the sum paid into Court in respect of mesne profits, and to a judgment for the amount of rent due less that amount.

Solicitors: *Stones, Morris & Stone; Lord & Peppercorn.*

K. R. A. H.

LUXMOORE J.

1930

June 2, 19, 24.

In re WESTERN ELECTRIC COMPANY LIMITED'S PATENT.

Patent—Convention Patent—Patentee entitled to Letters Patent protected in Foreign Country—Date of Application for a Grant in Great Britain—Delay in Application owing to War—Letters Patent granted after War—Application by Patentee for Extension—Retrospective Date—"Patentee as such"—Loss or Damage due to War—Patents, Designs, and Trade Marks (Temporary) Rules, 1914, *r.* 3—*Patents, Designs, and Trade Marks (Temporary Rules) Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 27)—*Patents and Designs Acts,* 1907 *and* 1919 (7 *Edw.* 7, *c.* 29, *and* 9 *&* 10 *Geo.* 5, *c.* 80), *ss.* 13, 18, *sub-s.* 6; 86, 91, 93.

A company became entitled in 1914 to apply for a patent in this country for an invention protected by letters patent in America dated May 18, 1914, and was therefore in a position to apply under s. 91 of the Consolidated Patents and Designs Acts, 1907 and 1919, for a Convention patent, the date of which when granted would be the same as that of the American letters patent. Owing to the War the company made no application for any grant of letters patent until March, 1920, when by virtue of powers of extension vested in the Comptroller under temporary rules made by the Board of Trade and having statutory force, a grant was made to the company of letters patent in respect of the invention. Shortly before the expiration of this grant the company in 1929 applied by originating summons for an extension of the term of the letters patent on the ground of losses which they alleged they had suffered by reason of the War:—

Held, that the patentees having been entitled to apply for a Convention patent were within the description of "patentee as such" in s. 18, sub-s. 6, of the Consolidated Patents and Designs Acts, 1907 and 1919, that the application for a grant had been properly postponed, and that they had suffered loss or damage owing to the War. They were therefore entitled to the extension they sought. As the term of the letters patent had expired at the date of the hearing a re-grant was necessary.

ORIGINATING SUMMONS.

The facts are more fully stated in the judgment of the learned judge, but are shortly as follows:—

An English company which was entitled in August, 1914, to apply for letters patent in respect of an invention which was protected by letters patent in America dated May 18, 1914, became owing to the War a controlled establishment for the manufacture of munitions and no application for the grant of letters patent was made until March, 1920, when in pursuance of powers of extension then vested in the Comptroller a grant was made to the applicants.

In November, 1929, application for an extension for five years was made by the patentees. The matter having come before the Court on an originating summons it appeared that an important question of construction under the Patents and Designs Acts, 1907 and 1919 (hereinafter in this report referred to as the "Consolidated Patents Acts"), s. 18, sub-s. 6, was involved.

J. Whitehead K.C. and *D. H. Corsellis* for the applicants. The application for extension is in respect of a Convention patent under s. 91 of the Consolidated Patents Acts. The rights of the patentee are retrospective. The important question is as to the construction to be placed upon the words "patentee as such" in s. 18, sub-s. 6, of the Consolidated Patents Acts: see *In re Summers Brown's Patent.* (1) Loss or damage has undoubtedly been suffered owing to the War and the applicant is entitled to an extension.

Stafford Crossman for the Comptroller-General of Patents.

J. Whitehead K.C. in reply.

Cur. adv. vult.

June 24. LUXMOORE J. The Standard Telephone & Cables, Ld., a company formerly known as the Western Electric Company, Ld., on November 15, 1929, applied by originating summons under the Consolidated Patents and Designs Acts, 1907 and 1919, s. 18, sub-s. 6, for an extension of the term of letters patent No. 141,047 of 1914 for a period of five years or for such further period as the Court should think fit.

The patent in question was granted in the following circumstances. On March 30, 1920, the applicant company applied for letters patent in respect of an invention made by one Edwin Henry Colpitts, a British subject resident in the United States of America and employed by a company called the Western Electric Company of Chicago on terms under

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(1) (1922) 39 R. P. C. 367.

LUXMOORE J.
1930
WESTERN ELECTRIC CO. LD.'S PATENT, *In re.*

which the benefit of all inventions made by him during the course of his employment belonged to the Western Electric Company of Chicago. The invention the subject of the letters patent was protected by letters patent in the United States of America dated May 18, 1914, the day on which the application for these letters patent was made in that country. The applicant company was at the date of the application for the American patent and down to the year 1925 a subsidiary company of the Western Electric Company of Chicago and under the arrangement existing between those two companies became entitled to the invention and to the benefit of any letters patent to be obtained for it in this country. The applicant company was in fact in a position at the outbreak of the War in August, 1914, to apply for the grant of letters patent in this country under the Consolidated Patents Acts, s. 91. Patents granted under this section are usually referred to as Convention patents, and under the statutory provisions relating to them the date of these letters patent is to be the date of the application for a patent in the foreign State in which protection has already been obtained. In the present case this date is May 18, 1914. Under the section I have referred to the application in this country had to be made within twelve months from the date of the application for the patent in America. No application had in fact been made at the time of the outbreak of the Great War.

The War necessarily gave rise to a great volume of emergency legislation, and among other things which had to be dealt with was the position relating to inventions and their protection by letters patent and the grant of licences under these letters patent. To meet this position the Board of Trade was in 1914 by a special Act given extended powers to make Rules under the Patents and Designs Act, 1907, and the Trade Marks Act, 1905. The extended powers provided (among others) for the avoidance and suspension in whole or in part of any patent or licence granted to a subject of any State at war with His Majesty and of any proceedings on any application made by any such person under either of the said Acts and for extending the time within which any act or thing might or was required to be done under those Acts. Any Rules so made were, if the Rules so provided, to have effect as from the passing of the special Act.

The short title of this Act is the Patents, Designs, and Trade Marks (Temporary Rules) Act, 1914. Sect. 86 of the Consolidated Patents Acts provides that the Board of Trade may make such general Rules as they think expedient for regulating the practice of registration under the Act (that is the Act of 1907) and for the general purposes specified in that section, and all general Rules so made are while in force to be of the same effect as if they were contained in that Act (the Act of 1907)—that is, these Rules are to have statutory force. Having regard to the form of the Patents, Designs, and Trade Marks (Temporary Rules) Act, 1914, the temporary Rules are given the same statutory force.

On August 21, 1914, temporary Rules were made by the Board of Trade. The material Rule so far as this application is concerned is r. 3 which provides that, "the Comptroller may also at any time during the continuance of these Rules extend the time prescribed by the Patents and Designs Act, 1907, ... or any Rules made thereunder, for doing any act or filing any document, upon such terms and subject to such conditions as he may think fit in the following cases, namely—," and then follow certain specified cases. The particular case material to this application is (*a*) " Where it is shown to his (the Comptroller's) satisfaction that the applicant . . . . was prevented from doing the said act, or filing the said document, by reason of active service or enforced absence from this country, or any other circumstances arising from the present state of war, which, in the opinion of the Comptroller, would justify such extension."

These Rules came into operation as and from August 7, 1914. The position with regard to the applicant company after the coming into force of these Rules was therefore as follows. Being entitled to the benefit of the invention covered by the application for the patent in the United States of America it was under s. 91 of the Consolidated Patents Acts entitled to apply for and obtain the grant of a British patent for that invention in priority to any other applicant, but the patent, instead of bearing the date of the application in this country, would have the same date as the date of application in America. Apart from the temporary Rules the application in this country was required to be made within twelve months from the date of the application in America, that is before May 18, 1915, but by reason of the temporary Rules the Comptroller was enabled to extend the time for the application in this country if he was satisfied that the applicant was prevented from making the application " by reason of active service or enforced absence from this country, or any other circumstances arising from the present state of war. . . . ."

The applicant company did not in fact apply for any letters patent in respect of the invention covered by the American patent until March 30, 1920. An application was made on that date and the certified extract from the register of patents which is exhibited to the affidavit sworn in support of this application on April 1, 1930, states that the application was a Convention application and was made on March 30, 1920, under the temporary Rules. This is equivalent to a certificate that the Comptroller had in exercise of his discretion conferred by the temporary Rules extended the time for the making of the application.

The patent granted to the applicant company was sealed on August 11, 1921, but this date does not appear on the original grant, which is dated " as of May 18, 1914." This appears to be in accordance with the practice and also with the provisions of s. 13 of the Consolidated Patents Acts. This section provides that " except as otherwise provided by this Act (that is the Act of 1907) a patent shall be dated and sealed as of the date of the application." Sect. 91, to which I have already referred, provides that a Convention patent shall have the same date as the date of the application in the foreign State, that is shall be dated and sealed as of the date of the application. In other words the letters patent appear to be dated so that the grant is retrospective as from the date mentioned. This appears to be the deliberate intention of the Act. One of the results of the antedating is that the grant expires on the expiration of sixteen years from the date of the foreign application.

The present application was made by originating summons on November 15, 1929, just over six months before the expiration of the grant and therefore within the time fixed for making any application for extension. The matter came before me on June 2, 1930, and on the summons being opened it appeared that a serious question arose with regard to the construction of the Consolidated Patents Acts, s. 18, sub-s. 6. This sub-section was added to the Patents and Designs Act, 1907, s. 18, by the Patents and Designs Act, 1919, s. 7, sub-s. 3. The summons accordingly stood over until June 19, when the question was argued by Mr. Whitehead K.C. and Mr. Corsellis on behalf of the applicant company and by Mr. Stafford Crossman on behalf of the Comptroller. Sect. 18, sub-s. 6, of the Consolidated Patents Acts provides as follows (1): [His Lordship read the sub-section.]

There have of course been many applications under this sub-section, but up to the present there has not been so far as I am aware any application for extension under it in relation to letters patent which had not been in existence at the outbreak of the War or had not been applied for at that date or subsequently during the period of the War. The question therefore arises whether an applicant who had not applied for a patent until after the War could be said to fall

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(1) Patents and Designs Act, 1919, s. 7, sub-s. 3: "At the end of the same section [s. 18 of the Patents and Designs Act, 1907], the following sub-section shall be added:—

(*b*) Where, by reason of hostilities between His Majesty and any foreign state, the patentee as such has suffered loss or damage (including loss of opportunity of dealing in or developing his invention owing to his having been engaged in work of national importance connected with such hostilities) an application under this section may be made by originating summons instead of by petition, and the court in considering its decision may have regard solely to the loss or damage so suffered by the patentee:

Provided that this sub-section shall not apply if the patentee is a subject of such foreign state as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's Dominions."

LUXMOORE J.

1930

WESTERN ELECTRIC CO. LD.'S PATENT, *In re.*

within the description "patentee as such" contained in the sub-section. If the true construction of the sub-section is that the loss or damage to be suffered by reason of the War must be suffered by a person who was the owner of the particular patent at the time when the loss or damage was suffered the answer to the question would I think be in the negative. But this construction would obviously be narrow and one which, having regard to the discretion imposed by the sub-section on the Court and the purpose for which this discretion was given, would seriously restrict the application of the powers thereby conferred. In my judgment the very object for which the discretion conferred by the sub-section was created requires that it should if possible be construed generously.

The words which appear to create the difficulty are those "the patentee as such." These words appear first of all in the Patents, Designs, and Trade Marks Act, 1883. Sect. 25, sub-s. 4, of that Act provides that among other matters which require to be considered with regard to the extension of the term of letters patent are the profits made by the patentee as such. This has invariably been considered as referring to and meaning the successive patentees throughout the term, that is to say the remuneration which has to be taken into account is the remuneration not merely of the patentee at the date of the application but it is the remuneration which has been earned by that person and his predecessors in title, and this remuneration is not restricted to that earned under the letters patent but comprises the remuneration from the invention itself. The phrase in the sub-section appears to me to be used with reference to the position of the successive patentees as owners of the invention covered by the patent. The phrase has also been the subject of judicial interpretation with reference to the same sub-section as is now under consideration. Sargant J. held in *In re Summers Brown's Patent* (1) that the words must be construed so as to include all those who had been beneficially interested in the subject-matter of the letters

(1) 39 R. P. C. 367.

patent during the whole of the period covered by the patent up to and including the hearing of the application. He based his decision on the fact that what had to be considered was the loss or damage suffered by reason of the loss of opportunity of dealing in or developing the invention, and that to confine this merely to loss or damage suffered by the owner of the letters patent at the date of the application would in effect so materially limit the operation of the sub-section as to render it practically ineffective in most of the cases where the letters patent had been assigned during or after the period of the War.

Now if the phrase " patentee as such " includes all those who have been successively interested in the invention not only as the mere legal owners of the patent but also as beneficially entitled to the invention protected by it there is nothing to prevent me putting the widest construction on the phrase in the sub-section under consideration, and I think I am assisted in this by the definition of " the patentee " in s. 93 of the Consolidated Patents Acts as meaning " the person for the time being entered on the register as the grantee or proprietor of the patent." Under this definition the applicant for a Convention patent must, if he obtain the grant, be the patentee as from the date from which the grant takes effect, that is the Convention date. For it seems plain from s. 13 of the Consolidated Patents Acts that the letters patent when granted are retrospective, at any rate as far as ownership is concerned. If this is so, it seems in my judgment to show that if the application was postponed during the War in such circumstances that the Comptroller had in the exercise of his discretion extended the time for application the grant when made was, at any rate so far as ownership is concerned, operative so as to constitute the applicant the owner of the patent as from the date from which the grant was to take effect. If this view is applied to s. 18, sub-s. 6, it seems to follow that the phrase " patentee as such " covers not only all those persons who were the owners of letters patent granted either before or during the War but also all those persons who were entitled to apply for the grant of letters patent which when granted would be as of a date antecedent to the date of the actual application, this date being itself either before or during the War period.

But even on this construction it will not necessarily follow that the owner of every grant in respect of an application made after the War which is dated back to a date before or during the War will be entitled to an extension of his patent under the statute, for in order to establish the right to extension it must be shown that the loss or damage he claims to have suffered has arisen by reason of the War or of circumstances arising out of it, and consequently it will be necessary in all cases like the present to satisfy the Court that the delay in making the application was due to circumstances arising out of the War and was not due to any outside causes such as mere negligence, passivity or the deliberate desire to postpone the application for as long a period as possible for reasons connected with the invention itself.

In the present case the applicant company was entitled to make the application when the War broke out. The evidence satisfies me that almost directly after the outbreak of the War the applicant company began to manufacture munitions and that this manufacture, as the War proceeded, wholly occupied the attention of the applicant company. On September 7, 1915, the applicant company became a controlled establishment and remained in that position until November 5, 1919, and it was not until March 30, 1920, that application was made for the grant of letters patent in respect of the invention. The register itself shows that the Comptroller was satisfied that sufficient reason for extending the time for the application existed in circumstances arising out of the War. I am myself satisfied by the evidence that the application was properly postponed by the applicant company by reason of its activities in the manufacture of munitions and other important Government requirements, and consequently the applicant company being the owner of the invention the subject-matter of the letters patent subsequently granted during the whole of the War period suffered loss or damage within the meaning of the sub-section.

LUXMOORE J.
1930
WESTERN ELECTRIC CO. LD.'S PATENT, *In re.*

In the circumstances I think the patent should be extended for the period of four and a half years. The patent expired on May 17, 1930, and it will therefore be necessary to make a re-grant in respect of the invention. I will accordingly order the re-grant in the form settled in *In re British Thomson-Houston Co. Ld.'s Patent* (1) for a period of four and a half years from May 17, 1930.

Solicitors: *Bristows, Cooke & Carpmael; Solicitor to the Board of Trade.*

A. R. T.

In re HULTON.

HULTON *v.* MIDLAND BANK EXECUTOR AND TRUSTEE COMPANY, LIMITED.

[1929. H. 1568.]

BENNETT J.
1930
March 5, 6; *April* 3.

Will—Construction—Gift of Annuity free of Super-tax—Sur-tax—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 2, 4, 56—*Finance Act*, 1927 (17 & 18 *Geo.* 5, *c.* 10), *ss.* 38, 42, 47—*Finance Act*, 1928 (18 & 19 *Geo.* 5, *c.* 17).

In every essential feature super-tax and sur-tax are the same tax.

Where a testator who died before 1927, gave a direction in his will to his trustees to pay an annuity of "a clear yearly sum of 12,000*l.* after paying or deducting income tax and super-tax," the sur-tax now in force must be paid by the trustees, subject to an apportionment (if any) in accordance with the decision in *In re Bowring* (1918) 34 Times L. R. 575.

ORIGINATING SUMMONS.

The testator by his will dated November 24, 1924, appointed the defendant company and his wife, the defendant Mrs. Thompson, his executors and trustees. Clause 14 of the will was in the following terms: "Out of the yearly income of my trust estate" (the testator's residuary estate) "my trustees shall pay to my said wife during her life such an amount as will give her a clear yearly sum of 12,000*l.* after paying or deducting income tax and super-tax at the rates from time to time in force but not as regards income tax exceeding in the whole five shillings in the pound, provided that the annual amount so payable to my wife shall not exceed one-half of the income of my trust estate." Subject to this annuity two-thirds of the trust estate were settled upon trusts for the benefit of the plaintiff, the testator's son Edward and his issue, and one-third was settled upon trusts for the benefit of the infant defendant, the testator's daughter Frances and her issue. The testator died on May 23, 1925. The testator's widow, the defendant Mrs. Thompson, remarried since his death. The income of the trust estate was about 50,000*l.* a year.

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(1) (1929) 46 R. P. C. 367, 377.

This summons was issued by the plaintiff with regard to other matters, and was amended after it had been issued by asking the question whether upon the true construction of the will the defendant, Mrs. Thompson, was entitled under clause 14 of the will to receive the annuity of 12,000*l.* thereby bequeathed free from the sur-tax imposed by s. 38 of the Finance Act, 1927 (which tax has now taken the place of super-tax).

Archer K.C. and *McMullan* for the plaintiff.

Gover K.C. and *Rink* for the defendant, Mrs. Thompson. Super-tax has been treated as part of income tax: *In re Crosse.* (1) The point also arose in *In re Crawshay* (2) and *In re Bates.* (3) Super-tax was simply an additional income tax. Sur-tax has taken the place of super-tax, and must be treated in the same way. It is the same tax under another name: see s. 38 and s. 42, sub-s. 10, of the Finance Act, 1927. No real change has taken place, and there can be no doubt that if the testator's intention is to be given effect to the sur-tax in respect of the 12,000*l.* must be paid by the trustees.

Cleveland-Stevens K.C. and *C. E. Rochford* for the infant defendant. Super-tax has gone: see s. 38 of the Finance Act, 1927. The direction therefore to pay the annuity after deducting super-tax has no longer any meaning. A similar point arose in *In re Boxer* (4) in respect to probate duty and estate duty, and it was held that a direction in a will executed in 1888 to raise duty—which had become extinct in 1896—did not operate as a direction to raise estate duty, which came into existence in 1894. Sur-tax in this case must be paid by the annuitant.

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(1) [1920] 1 Ch. 240.
(2) [1915] W. N. 412.
(3) [1925] Ch. 157.
(4) [1910] 2 Ch. 69.

Wilfrid Hunt for the trustees of the will.

Cur. adv. vult.

April 3. BENNETT J. [after stating the facts, in substance as above :] If the testator had simply directed his trustees to pay to his wife out of the income of his trust estate such an amount as would give her a clear yearly sum of 12,000*l.* after paying or deducting income tax it would, I think, have been reasonably clear that the trustees would have been bound to pay not only the income tax at what is now known as the standard rate, but also the sur-tax attracted by an annuity given in such a form : see *In re Crosse.* (1) But the limitation as regards income tax contained in the clause will, so long as sur-tax continues to be charged at the rates now in force, throw upon the annuitant the burden of discharging a considerable part of the sur-tax attracted by the annuity, unless what is in effect a direction to the trustees to pay the super-tax attracted by the annuity out of the income of the trust estate can be construed as a direction to pay the sur-tax.

It was, therefore, contended on behalf of the annuitant that in substance there is no difference between the sur-tax imposed by the Finance Act of 1928 and the super-tax and that in reality sur-tax is the old super-tax disguised under a new name.

On the other side it was contended that the sur-tax is a new tax upon income created by the Finance Act of 1927 and first imposed by the Finance Act of 1928, an Act which also charged the super-tax, and that when the testator referred in his will to super-tax he must be taken to have had in his mind the particular form of tax which by the name of super-tax had for some years before his death been annually imposed upon those individuals whose annual incomes were in excess of a certain amount.

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(1) [1920] 1 Ch. 240.

The most cogent argument in support of this contention was based upon the provisions of s. 38 of the Finance Act, 1927, the Act which creates the sur-tax and states in terms that super-tax shall not be charged for the year 1929–30 or any subsequent years. To judge between these arguments it becomes necessary to consider some of the statutory provisions relating to the super-tax and to the sur-tax. The super-tax was imposed for the first time by s. 66 of the Finance (1909–10) Act, 1910, and is described in that section as an additional duty of income tax. It was intended to be a permanent tax though imposed annually only: see *Bowles* v. *The Attorney-General.* (1) On the footing that it was a permanent tax provisions for its assessment were contained in Part II. of the Income Tax Act, 1918. Sect. 4 of that Act provided that in addition to the income tax charged at the rate prescribed for any year there should be charged levied and paid for that year in respect of the income of any individual the total of which from all sources exceeded a certain sum an additional duty of income tax, in this Act referred to as super-tax, at the rate or rates prescribed by Parliament for that year. Sect. 5 determined with respect to the individual chargeable the income upon which the assessment was to be made; and s. 6 provided that in the case of the death of an individual liable to super-tax during any year for which super-tax was charged a part only of the year's super-tax should be payable proportionate to the part of the year which had elapsed before the date of the death. For the purposes of assessment and charges to income tax (except as regards weekly wage earners) a year begins on April 6 and ends on the following April 5: see s. 2 of the Income Tax Act, 1918. The effect of these provisions was that an individual liable to be charged with super-tax was assessed on some date after April 6 in one year upon his total income from all sources for the year which ended on April 5 preceding the year of assessment. He was charged with and became liable to pay

(1) [1912] 1 Ch. 123, 136.

the super-tax so assessed during the year of assessment. If, by chance, he died during the year of charge he was liable to pay a part only of the sum charged, the part payable being proportionate to that part of the year which had elapsed before the date of the death. In Part III. of the Finance Act, 1927, provision was made for putting an end to the charge of super-tax after the financial year 1928–29 and substituting for it the tax now known as the sur-tax. The sections relevant to the decision of the present case are, first, s. 38, which is in the following terms: "Income tax for the year 1928–29 and every subsequent year shall, instead of being charged at a single rate, be charged at a standard rate and, in the case of an individual whose total income from all sources exceeds a stated amount, at a rate or rates exceeding the standard rate in respect of any part or parts of his income in excess of that amount, and where income tax is so charged for any year the following provisions shall have effect, subject to the other provisions of this Part of this Act—(*a*) all such enactments relating to income tax as were in force immediately before the commencement of this Part of this Act shall, in so far as they relate to income tax (not including super-tax) have effect as if income tax were charged for that year at the standard rate only, and in the case of an individual whose total income exceeds the stated amount, the amount of the income tax so charged shall, so far as that income tax is borne by him in respect of his income, be deemed to be an instalment at the standard rate of the amount of income tax for which he is chargeable for that year; (*b*) where the amount of income tax payable by an individual for that year in respect of his total income is greater than the amount which would have been payable by him in respect thereof if income tax had been chargeable at the standard rate only, the difference between those two amounts (in this Part of this Act referred to as 'sur-tax') shall be computed, assessed, charged, collected and paid as a deferred instalment of income tax according to the provisions of this Part of this Act relating to sur-tax; and super-tax shall not be charged for the year 1929–30 or any subsequent year. (2.) The expression 'total income' in relation to any person means the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to sur-tax." Secondly, s. 42, sub-s. 1, provides: "Sur-tax shall be due and payable as a deferred instalment of income tax on or before the first day of January next after the end of the year of assessment for which it is payable, except that sur-tax or any part of any sur-tax included in an assessment which is signed and allowed on or after the said first day of January shall be deemed to be due and payable on the day next after the day on which the assessment is signed and allowed." Lastly, s. 47, sub-s. 1, provides: "The provisions of the Income Tax Acts shall, in relation to matters dealt with in this Part of this Act, have effect subject to the provisions of this Part of this Act and shall, so far as inconsistent therewith, cease to have effect, and subject as aforesaid this Part of this Act shall be construed as one with the Income Tax Acts. (2.) The provisions of this Part of this Act shall, except as otherwise expressly provided, come into operation on the sixth day of April, 1928, but shall not apply to any duties of income tax or super-tax granted by Parliament before the commencement of this Part of this Act or to any super-tax for the year 1928–29 or to any enactment or matter touching any such duties or any such super-tax, and all enactments relating to income tax or super-tax which are in force immediately before the commencement of this Part of this Act shall continue to have effect in relation to any such duties or any such super-tax as if this Part of this Act had not passed, notwithstanding that those enactments are inconsistent with the provisions of or are expressly repealed by this Part of this Act. (3.) Subject to the provisions of this Act the enactments set out in Part I. of the Sixth Schedule to this Act shall be repealed to the extent mentioned in the third column of that Schedule as from the dates respectively mentioned therein." Part I. of Schedule VI. repeals as from April 6, 1929, Part II. of the

Income Tax Act, 1918; it repeals s. 33 of the Finance Act, 1920, as from the same date; sub-s. 2 of s. 29 of the Finance Act, 1923, as from the same date; and s. 29 of the Finance Act, 1924, as from the same date. It will be observed that the Finance Act, 1927, did not make any charge of sur-tax but merely made provision for its charge in the following financial year—namely, the year 1928-29.

The Finance Act, 1928, by s. 15, sub-s. 1, charged income tax for the year 1928–29 at the standard rate of 4*s.* in the £ and in the case of the individual whose total income from all sources exceeded 2000*l.* at certain stated higher rates in respect of the excess over 2000*l.* The difference between the amount of the standard rate of tax and the higher rates was the sur-tax. Sub-s. 2 of the same section enacted that the rates of super-tax for the year 1928–29 should for the purposes of s. 4 of the Income Tax Act, 1918, be the same as those for the year 1927–28. The effect of these provisions was that the individual whose income in the year 1928–29 was in excess of 2000*l.* was in that year assessed to and charged with super-tax and sur-tax, the super-tax was payable in the year of assessment—namely, in the year 1928–29, but the sur-tax was not payable until January 1, 1930. The liability to be assessed to and charged with both taxes arose from the same fact—namely, the receipt by an individual of a total income from all sources in excess of 2000*l.* Both super-tax and sur-tax were charged at identical rates and were assessed upon the same basis. The only difference between the two was that one was payable on January 1, 1929, and the other on January 1, 1930. For the year 1929–30 under the provisions of the Finance Act, 1929, income tax was charged at the standard rate of 4*s.* in the £ and in the case of individuals whose total income from all sources exceeded 2000*l.* at the same higher rates in respect of the excess over 2000*l.* as were charged for the year 1928–29. This charge was, of course, made under the provisions of s. 38 of the Finance Act, 1927, and the additional tax at the higher rates upon those individuals whose incomes exceeded 2000*l.* is the sur-tax which will not become payable until January 1, 1931. The existing legislation shows that it is the present intention to continue the method of charging and collecting the additional tax upon income referred to in s. 38 of the Finance Act, 1927, as sur-tax. As far as I can see there is no real or substantial difference between super-tax and sur-tax. Both taxes are taxes imposed upon individuals whose incomes are in excess of some standard sum to be raised or lowered annually by Parliament. Both are taxes upon the amount of the excess of income over the fixed standard. Both are graduated taxes. The only result of the change from super-tax to sur-tax brought about by the Finance Acts of 1927 and 1928 was to charge individuals who were liable to be charged with super-tax in the year 1928–29 with an additional tax of the same amount payable in the year following the year of assessment and charge. In every essential feature super-tax and sur-tax are, in my judgment, the same tax. In my judgment I should be defeating the clearly expressed wishes of this testator if I were to hold that the trustees of his will are not to pay the additional duty of income tax attracted by the annuity he has given his wife merely because Parliament, for some reason into which it is unnecessary to inquire, has given to the old super-tax the new name of sur-tax.

There may be a question whether the deferred instalment of the tax which, if existing legislation continues, must become payable after the annuitant has died is or is not payable out of the income of the testator's trust estate. I do not propose to decide this question now. It is a future question which may never arise.

I do not know whether the defendant, Mrs. Thompson, is in receipt of any income in addition to the annuity given to her by clause 14 of the testator's will. If she is, then, as at present advised, it seems to me that there must be an apportionment of the sur-tax in accordance with the decision in *In re Bowring* (1), and the declaration I propose to make, subject to what the parties have to say, is in these terms: Declare that the annual income of this testator's trust estate must bear such proportion of the sur-tax which becomes from time to time during the lifetime of the defendant, F. E. M. Thompson, payable in respect of the annuity bequeathed to her by clause 14 of the will of the testator as the sums upon which she is from time to time assessed to sur-tax in respect of the said annuity bear to the total sums upon which she is from time to time assessed to sur-tax, but so that the annual amounts paid in respect of the said annuity do not exceed one half of the income of the said trust estate, and this declaration is to be without prejudice to any question whether any sur-tax payable after the death of the said defendant in respect of the said annuity is to be paid out of the income of the said trust estate.

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(1) 34 Times L. R. 575.

Solicitors: *Blount, Lynch, Petre & Colley; Linklaters & Paines.*

P. J. B.

In re FENTON.

Ex parte FENTON TEXTILE ASSOCIATION, LIMITED.

C. A.
1929
LUXMOORE J.
Nov. 19, 21, 22, 25, 26, 27;
1930
Feb. 20.
C. A.
May 2, 5, 6, 30.

Bankruptcy—Deed of Arrangement—Debtor indebted to Company in Liquidation—Proof by Liquidator—Debtor Surety for Advances made to Company—Claim by Trustee to set off Amounts guaranteed and proved for but not paid by Debtor—Principal Debtor and Surety—"Mutual Dealings"—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31.

F. having guaranteed advances by certain banks to the T. Association in which he was interested, subsequently executed two deeds of arrangement in favour of his creditors. The Association having gone into liquidation the liquidator lodged a proof against F.'s estate in respect of sums due by F. to the Association. The trustee of F.'s estate rejected the proof and claimed to set off the various sums which had been advanced by the banks to the Association for which F. had given his personal guarantee. The banks had proved against F.'s estate under the guarantees but nothing had been paid to them:—

Held (reversing the decision of Luxmoore J.), that inasmuch as none of these sums had in fact been paid by F. or his trustee to the banks the trustee was not entitled, under s. 31 of the Bankruptcy Act, 1914, to set off F.'s contingent liability under the guarantees against the sums due by him to the Association.

C. A.
1929
FENTON, *In re.*
FENTON TEXTILE ASSOCIATION, *Ex parte.*

MOTION by way of an appeal from the rejection by the trustee of a deed and supplemental deed of arrangement executed by one Henry Fenton of certain items in the proof of the Fenton Textile Association, Ld. (hereinafter called "the Association"), against Fenton's estate.

In 1919 Fenton, who was a woollen manufacturer and a large holder of shares in various textile concerns, formed the Association in order to amalgamate a group of woollen mills in which he was interested and of which he had practically the sole control.

In 1921, owing to severe trade depression and to depreciation in the value of the shares, Fenton executed the deed and supplemental deed of arrangement above referred to in favour of his creditors, which were dated respectively September 19, 1921, and October 10, 1921.

The following statement of facts relating to the subject of the motion is taken from the judgment of Luxmoore J. :—

On November 28, 1927, the Association presented to the trustee under the two deeds a proof against Henry Fenton's estate for a total sum of 557,501*l.* 12*s.* 10*d.* This formed part of a larger sum comprising a number of items in respect of which the Association claimed to be a creditor of Henry Fenton on September 19, 1921, the date of the execution of the first deed of arrangement, and was arrived at after giving credit for a number of other items which it was admitted Henry Fenton was entitled to set off against the various amounts claimed as being due from him. The trustee of the deeds of arrangement admitted that Henry Fenton was indebted to the Association in respect of large sums of money, but rejected the proof in toto in order that the precise amount for which the Association ought to be admitted to prove might be ascertained and fixed by the Court. The Association's appeal from this rejection came before me by way of motion on November 19 last, and after a hearing occupying some five days the total amount of the credit items in favour of the Association was fixed by agreement between the parties, but certain legal questions were left for my decision. I have dealt with all those questions with the exception of one which is the subject of this judgment. That question is whether the trustee was entitled to set off against the total amount of the credit items certain sums repayment of which Henry Fenton had guaranteed to certain banks on behalf of the Association.

The guarantees given by Henry Fenton for or on behalf of the Association are four in number, and the facts with regard to them are as follows: The first guarantee in point of date was given by Henry Fenton to the Bank of Liverpool & Martins, Ld. It purports to be a guarantee of the banking account of a company called Sands & Mundel, Ld. This company constituted one of the companies taken over and amalgamated with other companies on the formation of the Association, and it is admitted that the Association is in fact the principal debtor under this guarantee. The guarantee is dated March 30, 1920, and is addressed to the Bank of Liverpool & Martins, Ld. In form it is a joint request by Henry Fenton and one George Henry Gale, and so far as material it is in the following words: "We request that you will allow Sands & Mundel, Ld. (hereinafter referred to as 'the customer') to keep an account with you and/or to overdraw the same from time to time as he/they may require and you may think fit and in consideration of your so doing and/or giving him/them such banking accommodation as he/they may from time to time require and you may think fit to give we hereby jointly and severally guarantee to you the payment on demand of the balance for the time being of the account of the customer with you and also the due payment and discharge of all obligations and liabilities to you matured and unmatured to which the customer is now or shall for the time being be subject (either alone or jointly with any other person or persons) so as our joint and several liability hereunder shall not exceed at any time the sum of 10,000*l.* (say ten thousand pounds) with interest at the rate of 5*l.* per centum per annum from the time when payment of the amount hereby guaranteed shall be demanded by you from us respectively. We do not mean that your dealings should be limited to that amount but that our joint and several liability under this guarantee shall not exceed the said amount of ten thousand pounds and interest as above." The guarantee permits the granting of time or indulgence by the principal creditor without affecting the liability of the guarantors or either of them and it also provides: "You shall be entitled to all dividends in bankruptcy or liquidation compositions or other moneys receivable from the estate of the customer or otherwise in respect of your whole debt until you are fully paid although we or any/either of us may have discharged the amount of this guarantee and we shall not nor shall any/either of us be entitled to claim or have the benefit of any securities held by you in respect thereof. . . . ." The guarantee is stated to be a continuing guarantee and is in a common form in use by banks.

After the deeds of arrangement were executed the trustee of the deeds wrote to the Bank of Liverpool & Martins, Ld. asking what claims the Bank of Liverpool & Martins proposed to make, and on July 10, 1922, the bank replied stating that it claimed 10,000*l.* under this guarantee. There is no dispute between the parties as to the fact that at the date the deed of arrangement was executed Henry Fenton was liable under this guarantee to the bank to the full extent of the guarantee—namely, 10,000*l.*

The second guarantee in point of date was given on April 23, 1920, by Henry Fenton alone in favour of the Lancashire and Yorkshire Bank, Ld. Again the guarantee is in a very usual form. It provides: "In consideration of the Lancashire and Yorkshire Bank Ld. their successors or assigns (hereinafter called the 'bank') granting continuing or incurring credit accommodation or liability to or on account of the Fenton Textile Association, Ld. (hereinafter called 'the principal') I the undersigned (hereinafter called 'the guarantor') guarantee to the bank the payment and satisfaction of all moneys and liabilities which now are or from time to time may be owing to the bank whether as bankers or otherwise by or which the bank may have already or may hereafter become liable to pay for or on behalf of the principal whether solely or jointly on any account whatsoever with the bank's usual banking charges and all law and other costs and expenses. Not more than 150,000*l.* (one hundred and fifty thousand pounds) with interest thereon at 5 per cent. per annum from the day payment thereof is required shall be recoverable hereunder and it shall not be incumbent on the bank to enforce any payment from the principal before requiring the guarantor to pay the amount hereby secured." The guarantee was to be a continuing security and was to remain in force until the expiration of fourteen days after notice in writing by the guarantor or his representative should have been given to the bank. There was the usual power to grant time or indulgence, followed by a provision that "the guarantor will not make any claim or proof or take any security in competition with the bank or which would prejudice the bank's claim on or dividend from any estate in respect of any of the items hereby secured and any payments made by the guarantor under this guarantee shall not necessarily be taken in immediate reduction of the liability of the principal to the bank but shall if and for so long as the bank so elects be held by the bank as a deposit against ultimate loss." On December 17, 1926, the trustee under the deeds of arrangement wrote to the Lancashire and Yorkshire Bank, Ld., asking if the bank had any claim against Henry Fenton's estate and for particulars. On December 22, 1926, the bank in answer to this inquiry wrote stating that the bank's claim against Henry Fenton under this guarantee was 126,795*l.* Again there is no dispute as to quantum.

The third guarantee was given on June 14, 1920, by Henry Fenton alone to the Midland Bank. It purports to be a guarantee of the banking account of David Bradley, Ld. (which is described as a branch of the Association). Again no dispute arises on this account, for the parties admit that the principal debtor under this guarantee is the Association. The guarantee is in a common form used by bankers: In consideration of allowing David Bradley, Ld., to keep an account with the London Joint City and Midland Bank, Ld., and granting to them banking facilities Henry Fenton agrees "to pay and satisfy to the bank their successors or assigns all and every the sum and sums of money which shall at any time be owing to the bank their successors or assigns anywhere on any account whether from the principal solely or from the principal jointly with any other person or persons or from any firm in which the principal may be a partner for notes or bills discounted or paid or for other loans credits or advances made to or for the accommodation or at the request either of the principal solely or jointly or of any such firm as aforesaid or for any money for which the principal may be liable as surety or in any other way whatsoever together with in all cases aforesaid all interest discount and other bankers' charges including legal charges occasioned by or incident to this or any other security held by or offered to the bank for the same indebtedness or by or to the enforcement of any such security." Then there is a provision limiting the total liability to 20,000*l.* with interest thereon at 5 per cent. per annum from the date of demand until payment. It is to be a continuing security. There was a further provision: "Although my ultimate liability hereunder cannot exceed the limit hereinbefore mentioned yet this present guarantee shall be construed and take effect as a guarantee of the whole and every part of the principal moneys and interest owing and to become owing as aforesaid and accordingly I am not to be entitled as against the bank their successors or assigns to any right of proof in the bankruptcy or insolvency of the principal or other right of a surety discharging his liability in respect of the principal debt unless and until the whole of such principal moneys and interest shall have first been completely discharged and satisfied." It is agreed that the amount due under this guarantee at the date of the deed of arrangement was 20,000*l.*, and no dispute arises in this case also with regard to quantum.

The last of the four guarantees is dated November 29, 1920, and was given by Henry Fenton alone to the London Joint City and Midland Bank. It purports to be a guarantee of the banking account of Thomas Ibbitson & Co., of Holbeck Mills, Leeds, described in the guarantee as "Branch of Fenton Textile Association, Ld." Again no dispute arises on the account guarantee, for it is admitted that the Association is the principal debtor under the guarantee. The guarantee is the same form as the third guarantee above referred to, the liability being limited to 10,000*l.* with interest at 5 per cent. per annum to the date of the demand by the bank for payment.

On July 12, 1922, the Midland Bank in answer to a request made on behalf of the trustee under the deeds of arrangement stated that the total liability under the third and fourth guarantees was 30,000*l.* There is no dispute as to quantum in the case of these guarantees. The result is that the total liability under the four guarantees is admitted to be 166,795*l.* The trustee under the deeds of arrangement claims to set off the whole of this sum against the agreed amount of the credit items in favour of the Association. The Association resist this claim on two grounds: the first peculiar to the facts of this case, and the second on general principles applicable to cases of suretyship.

The amount for which the proof was originally lodged was 557,501*l.* 12*s.* 10*d.*, but during the hearing of the motion, as the result of the evidence and of mutual concessions, it was reduced to 423,192*l.* For the purposes, however, of the present report, which deals only with the question of principle, the actual amount of the proof is not material.

Harold Murphy and *W. N. Stable* for the Association.

J. W. Morris and *H. J. Baxter* for Fenton's trustee.

Cur. adv. vult.

Feb. 20. Luxmoore J. The question upon which I reserved my judgment in this case arises in connection with the proof of the Fenton Textile Association, Ld. (to which I will refer as "the Association"), under a deed of arrangement executed by one Henry Fenton for the benefit of his creditors on September 19, 1921, and a supplemental deed dated October 10 of the same year.

The facts so far as material are shortly as follows: [His Lordship read the facts set out above.] The first ground of objection to the claim of the trustee was that Fenton must have received most of the money in respect of which the guarantees were given and consequently it would not be right to allow him the equitable relief of indemnity in respect of the guarantees. In this connection it must be remembered that the claim of the Association in respect of the credit items has been fixed on the basis that the amounts at any rate include the moneys of the Association received by Fenton and used by him for purposes other than those of the Association. In other words, the amounts received from the banks so far as they were received by Fenton were included in the amount for which it is agreed the Association can claim credit against Fenton. It would not be right to make Fenton's estate liable for the whole of this amount and refuse to recognize his right of indemnity under the guarantees. This would in effect be allowing the Association to take the benefit of the guarantees without bearing any part of the burden. In my opinion there is no substance in the first point.

The second point, however, is one of some difficulty. So far as I am aware there is no reported decision which covers the actual question which arises in this case. The question is: Can the Association as principal debtor prove against the estate of Fenton who is a surety for the total sum admitted to be due to the Association from Fenton in his individual capacity without taking into account his right to indemnity under the guarantees on which nothing has been paid by Fenton? In considering this question the following facts must be borne in mind: (1.) The Association is itself insolvent and in liquidation (an order for its winding-up compulsorily having been made by the Court on June 12, 1923). (2.) The banks have not put in any proof in the winding-up of the Association, because it is admitted that there can in no circumstances of the case be any assets available in the winding-up of the Association for unsecured creditors. (1)

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(1) This was admitted during the argument before Luxmoore J., but it transpired during the hearing before the Court of Appeal that at least one of the banks had proved in the winding-up of the Association: see pp. 95, 96, post.

(3.) The banks have respectively proved against the estate of Fenton under the deeds of arrangement for the full amount of the several guarantees.

In the ordinary case where a principal debtor becomes bankrupt, both the principal creditor and the guarantor have rights which have to be considered. If the principal creditor proves in the bankruptcy, the rules against double proof prevent the guarantor pursuing any remedy against the principal debtor, except in so far as he is entitled to stand in the shoes of the principal creditor in respect of the proof if and when he has paid what is due to the principal creditor. If the principal creditor does not prove against the principal debtor but recovers the amount due from the guarantor, the guarantor can prove for the amount paid to the principal creditor. What is the position if the principal creditor does not prove and has not in fact sued the guarantor in respect of the amount guaranteed or having sued the guarantor has recovered nothing? Can the guarantor prove in the bankruptcy of the principal debtor? There is, I think, no doubt that the guarantor who has not been called upon to pay under his guarantee has a contingent claim against the principal debtor for the amount he may ultimately be required to pay and that he is a creditor in respect of this contingent claim within the meaning of the Bankruptcy Act. This follows from the decisions in *In re Paine* (1); *In re Herepath & Delmar* (2); *In re Blackpool Motor Car Co.* (3) It is true that Cave J. in *Ex parte Whittaker* (4) expressed a doubt as to the extent of the decision in *In re Herepath & Delmar* (2), but at any rate so far as the surety's right to prove for the contingent liability is concerned this doubt is resolved by those of the decisions to which I have referred, which are subsequent in date to the decision in *Ex parte Whittaker*. (4)

In *Wolmershausen* v. *Gullick* (5) it was decided that a surety against whom judgment had been obtained by the principal

(1) [1897] 1 Q. B. 122.
(2) (1890) 7 Morr. 129.
(3) [1901] 1 Ch. 77.
(4) (1891) 63 L. T. 777.
(5) [1893] 2 Ch. 514.

creditor for the full amount of the guarantee but who has paid nothing in respect thereof can maintain an action against a co-surety to compel him to contribute towards a common liability, and it was also decided in the same case that for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment where the principal creditor is a party to the action. A surety may obtain an order on the co-surety to pay his proportion to the principal creditor, and where he is not a party the surety may obtain a prospective order directing the co-surety upon payment of the surety of his own share to indemnify him against further liability. But this does not get rid of the difficulty as to the amount for which a surety who has paid nothing can prove in the bankruptcy of the principal debtor or of a co-surety.

In the present case the principal creditors (the banks) have not made any claim against the principal debtor (the Association) (1), and although Fenton has not made any payment to the principal creditors in respect of the several guarantees, the principal creditors have been admitted to prove against his estate for the full amount of those guarantees, and the position is therefore the same as if judgment for the full amounts had been obtained by the banks against him. No claim has been made by the principal creditors against the principal debtor (the Association) in the winding-up, because it is admitted that a claim of this kind would be otiose inasmuch as there are no assets of any kind available for unsecured creditors. The result must be that the guarantor must bear the whole burden of the guarantees so far as that burden is borne by any of the parties concerned. In these circumstances it seems to me that the measure of the contingent liability in respect of each guarantee must be the total amount of that guarantee and consequently the guarantor is in each case entitled to prove for that amount against the principal debtor. If the guarantor can prove against a principal debtor for the total amount, that amount can equally well be set off under the Bankruptcy Act, 1914,

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(1) See footnote on p. 92.

C. A.
1930

FENTON, *In re.*
FENTON TEXTILE ASSOCIATION, *Ex parte.*

Luxmoore J

s. 31 (1), against any separate liability of the guarantor to the principal debtor in respect of transactions wholly outside the guarantees. The opposite conclusion would have this extraordinary result—namely, that the principal debtor could prove for the full amount due to him from the surety in competition with the principal creditors' proofs under the respective guarantees and thereby reduce the dividends payable in respect of those proofs, although the principal debtor has in fact paid nothing to the principal creditors in respect of the debts which constitute the basis of those proofs, and the dividends to be received out of the surety's estate of the principal debtor are not to be made available in any way for the claims of the principal creditors against the principal debtor. This would in my opinion be contrary to all equitable principles.

In the result I hold that the amounts for which the principal creditors have proved against Henry Fenton's estate under the deeds of arrangement—namely, 166,795*l.*, must be set off against the agreed amount of the credit items claimed by the Association against Henry Fenton's estate.

The costs of the motion must be paid by the trustee under the deeds of arrangement out of the estate.

A. R. T.

C. A.

The liquidator of the Association appealed. The appeal was heard on May 2, 5 and 6, 1930. On the hearing before

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(1) Bankruptcy Act, 1914, s. 31: "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in any case where he had, at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him."

C. A.
1930
FENTON, *In re.*
FENTON TEXTILE ASSOCIATION, *Ex parte.*

the Court of Appeal it transpired that one of the banks had lodged a proof in the winding up of the Association but that the others had not.

W. N. Stable (*Harold Murphy* with him) for the appellant. The only question for the determination of the Court is whether the respondent, the trustee of Fenton's estate, is entitled to set off the 166,795*l.*, the total amount of the four guarantees given by Fenton to the banks, against the 436,192*l.* due from him to the Association, that is, whether the Association is entitled to prove against Fenton's estate for the full amount of 436,192*l.*, or for 269,397*l.*, the balance after setting off the 166,795*l.*

Luxmoore J. has held that Fenton's trustee was entitled to set off the 166,795*l.* due from Fenton in respect of the four guarantees to the banks and that the Association was only entitled to prove for the balance of their debt after giving credit for that sum.

It is submitted that the decision of Luxmoore J. was wrong and that no set-off ought to have been allowed. Although the right of the banks to prove against the Association is a valueless right, having regard to the fact that there will be nothing for its unsecured creditors, the right still remains, and Fenton has bound himself by contract in the guarantees not to prove in competition with the banks against the principal debtor, the Association. Further the right of a surety to indemnity is an equitable right, and, in the present case, neither Fenton nor his trustee can assert such a right inasmuch as a large part of the overdrafts represented money drawn out by Fenton himself and appropriated to his own purposes.

[LORD HANWORTH M.R. For the purposes of this tripartite arrangement we must treat this money as lent to the Association.]

As between Fenton and the Association one is entitled to see who had the benefit of these overdrafts.

The second point is one of far-reaching importance—namely, whether a surety is entitled to set off the whole amount of his obligation under his guarantee notwithstanding that he has made no payment under it.

The effect of the decision of Luxmoore J. is to put Fenton in the same position as if he had discharged the whole of the amount due under the guarantees.

It is conceded that the rules of set-off are those contained in s. 31 of the Bankruptcy Act, 1914. These rules are expressly incorporated in the Deeds of Arrangement Act, 1914, now under consideration.

It is admitted that if the surety had paid the sums due under the guarantees there would have been a "mutual dealing" within the meaning of s. 31 and the surety would have been entitled to set off the amount so paid.

The test of whether a set-off should be allowed is that provided by s. 31 of the Act itself. There is nothing in the section which allows the set-off against a money claim of anything but a money claim, and certainly not an inchoate claim unless it must result in a money claim. A claim to an indemnity cannot be set off against a liquidated sum.

To bring himself within s. 31 of the Act Fenton's trustee must prove that there were mutual debts or mutual credits between Fenton and the Association. There must be on each side of the account a sum actually due by one party to the other. There is no reported case in which a set-off has been allowed except where the sum was actually due. Thus there cannot be a set-off of the value of goods against money due: *Rose* v. *Hart* (1); *Eberle's Hotels and Restaurant Co.* v. *Jonas.* (2)

It is conceded that the obligation of the principal debtor to indemnify the surety gives rise to a provable debt, and that the discharge of the principal debtor discharges him from his liability to his surety.

In *In re Daintrey* (3) it was held that the date of the receiving order, and not that of the act of bankruptcy, was the proper date at which to ascertain what the dealings were, so as to be capable of being made the subject of set-off. The case

(1) (1818) 8 Taunt. 499.
(2) (1887) 18 Q. B. D. 459.
(3) [1900] 1 Q. B. 546.

was a simple one of set-off, on its facts, and is a very long way from the present case.

[LORD HANWORTH M.R. referred to *Ex parte Barrett.* (1)

Schiller K.C. referred to Lord Bramwell's comments on that case in a subsequent application on another point in the same case. (2)

LAWRENCE L.J. There the debt had been paid.]

In *In re Sass* (3) it was held, in a case where a surety had given a guarantee to a bank for the whole debt of a customer but had limited his liability to a specified amount, and the bank had recovered that amount from the surety, that the bank were not thereby precluded from proving for their whole debt without deduction in the bankruptcy of the customer.

Here it is submitted that Fenton's trustee has failed to prove that any sum of 166,795*l.* was owing by the Association to Fenton, and, therefore, no question of set-off arises.

Schiller K.C., *J. W. Morris* and *H. J. Baxter* for the respondent. It is submitted (1.) that there is nothing in this case to displace the well known rule that a surety is entitled to set off a sum for which he has become liable on a guarantee against a debt due by him to the principal debtor ; and (2.) that the words " sum due " in s. 31 of the Act are not synonymous with the words " sum payable."

The first question to be considered is what are the rights and obligations of a surety ?

It is not necessary, it is submitted, that the surety should first have paid under the guarantee before he can prove in the bankruptcy of the principal debtor : *Wolmershausen* v. *Gullick.* (4) In that case it was held, under s. 37 of the Bankruptcy Act, 1883, that the liability of a bankrupt surety to contribution, though unascertained at the time of the bankruptcy proceedings, was a debt provable in the bankruptcy. If the surety has the right to have money set aside to provide for his indemnity, that money becomes a definite sum which may be set off.

(1) (1865) 13 W. R. 559.
(2) (1865) 34 L. J. (Bank.) 41.
(3) [1896] 2 Q. B. 12.
(4) [1893] 2 Ch. 514, 526.

The banks are the only persons who can prove against the Association. The surety cannot do so, for if he did there would be a double proof. Further the surety has limited his right of proof by undertaking not to prove in competition with the banks.

[LORD HANWORTH M.R. What we have to consider is whether there have been mutual dealings between Fenton and the Association within the meaning of s. 31.]

In *Gibson* v. *Bell* (1) the principle is thus stated by Tindal C.J.: "The principle which the bankrupt laws seem to have had in view from the earliest time to the last provisions made therein, is this, that where two persons have dealt with each other on mutual credit, and one of them becomes bankrupt, the account shall be settled between them, and the balance only payable on the other side." The meaning of the words "mutual dealings" has been very much extended. They include every case where there are provable claims on both sides. In Williams on Bankruptcy, 13th ed., p. 171, it is stated that "all claims provable in bankruptcy, provided there is mutuality, may be the subject of set-off, because the words 'mutual dealings' will include every case of provable claims, and this although in the Act, as in those of 1869 and of 1883 there are no express words similar to those in the Act of 1849, making all provable debts the subject of set-off. . . . . The right of set-off as enlarged by the Act of 1869, and s. 38 of the Act of 1883 has been held to extend to unliquidated damages if provable." And see *Peat* v. *Jones* (2) and *Jack* v. *Kipping*. (3) All that is necessary is that the dealings should be between the same parties.

[LAWRENCE L.J. You cannot leave out of account the fact that the guarantor here is insolvent as well as the Association.]

It is sufficient for the purposes of set-off if there is a provable debt on either side.

[LORD HANWORTH M.R. Is Fenton's debt a provable debt? Can he prove against the Association when the bank is also proving? It would be the case of a double proof.

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(1) (1835) 1 Bing. (N. C.) 743, 753.

(2) (1881) 8 Q. B. D. 147.

(3) (1882) 9 Q. B. D. 113.

LAWRENCE L.J. It is the double insolvency here which creates the whole difficulty.]

A surety before he has been called upon to pay as surety is a "creditor" within s. 48 of the Act of 1883: *In re Blackpool Motor Car Co.* (1)

It is admitted that in an action at law Fenton could not recover against the Association until he had paid.

In *Palmer* v. *Day & Sons* (2) it was held that a deposit by the debtor of pictures with auctioneers, with authority to sell subject to his approval, constituted a giving of credit to the defendant auctioneers; that there were therefore mutual dealings between him and the defendants at the date of his bankruptcy in respect of which he had a right of set-off in bankruptcy under s. 38 of the Act of 1883.

The question of set-off only arises if there are provable debts on both sides. What has therefore to be decided in the present case is whether the debts in question are provable debts, and it is submitted that they are. A provable debt may be set off, though in certain circumstances it may not be admissible to proof. The surety here is a creditor of the principal debtor, the Association.

[LORD HANWORTH M.R. referred to the observations of Mellish L.J. in *In re Oriental Commercial Bank.* (3)]

The statement of Lord Russell of Killowen C.J. in *Palmer* v. *Day & Sons* (4) that "The [mutual dealings] section in its present shape, however, has been held applicable to all demands provable in bankruptcy, and so to include claims as well in respect of debts as of damages liquidated or unliquidated provided they arise out of contract" was approved by Pollock M.R. in *In re City Life Assurance Co.* (5)

If, however, the Court holds that there can be no set-off of the sums in question, then, it is submitted, that Fenton's trustee is entitled to set off the dividend he pays to the Association against the dividend he pays to the banks.

(1) [1901] 1 Ch. 77.
(2) [1895] 2 Q. B. 618.
(3) (1871) L. R. 7 Ch. 99, 103.
(4) [1895] 2 Q. B. 618, 621.
(5) [1926] Ch. 191, 201.

C. A.
1930
FENTON,
In re.
FENTON
TEXTILE
ASSOCIATION,
Ex parte.

Stable in reply. The set-off claimed in this case does not come within the section.

In *In re Parker* (1), where one of two co-sureties had paid the creditor the whole of the debt and had taken an assignment of the securities, it was held that he was entitled under s. 5 of the Mercantile Law Amendment Act, 1856, to bring an action against his co-surety, or to prove against his estate, as assignee of the creditor, for the full amount of the debt, although he could only actually recover the just proportion which, as between the sureties, the co-surety was liable to pay. That case shows how the right is one of subrogation.

If the banks in this case prove, the surety cannot do so, as he has expressly contracted that he will not do so in competition with them.

In re Herepath & Delmar (2), which was relied upon by the respondent, was a case of a somewhat remarkable character. It was commented upon in *Ex parte Whittaker* (3), where it was said that the case did not decide what the headnote represented it to have decided.

A provable debt is a debt which is provable if circumstances permit. There is not a word about a provable debt in s. 31 and nothing about contingent claims which may or may not become the subjects of proof. There is here but one debt and there can only be one proof in respect of it. Until the principal creditor has been paid the surety cannot prove. A surety who has not paid cannot prove.

[LAWRENCE L.J. It is difficult to see how a surety who has not paid anything can have a provable debt at all.]

In order to have a right to set-off the claim must be one which could be made the subject-matter of a proof ranking for dividend.

Cur. adv. vult.

May 30. The following written judgments were delivered:—

LORD HANWORTH M.R. This is an appeal from a judgment of Luxmoore J. given on February 20, 1930, by which he determined that the proof of the Fenton Textile Association, Ld., under a deed of arrangement, executed by Henry Fenton for the benefit of his creditors on September 19, 1921, and a supplemental deed dated October 10 of that year, was to be reduced by a set-off under s. 31 of the Bankruptcy Act, 1914.

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(1) [1894] 3 Ch. 400.

(2) 7 Morr. 129.

(3) 63 L. T. 777.

Fenton had been interested in a number of firms and companies engaged in the textile trade, and in June, 1919, formed them as a group into the above named company, which I will call for short "the Association." It is now in liquidation, an order to wind it up compulsorily having been made on June 12, 1923, and it is insolvent. No assets are available for its unsecured creditors. The figures are not in dispute. The claim of the Association is to prove against Fenton's estate for 436,192*l*. That sum has been reached after certain items have been set off against the claims of the Association, items as to which it is not disputed that Fenton had a right of set-off.

The question to be determined arises as to a sum of 166,795*l*., which is the total for which Fenton is liable to three banks as surety to them for the Association. Fenton had given four guarantees to the banks, three by himself alone and one with others, in respect of overdrafts made by the banks for which the Association is in the events that have happened the principal debtor. These guarantees are more fully referred to in Luxmoore J.'s judgment. In each of them the surety guarantees the whole amount, but his liability is limited to the amounts stated therein respectively, and in each provision is made that the surety is not to be entitled, as against the bank their successors or assigns, to any right of proof in the bankruptcy or insolvency of the principal debtor, or other right of a surety discharging his liability in respect of the principal debt, unless and until the whole of such principal money and interest shall have been discharged and satisfied. The result is that the banks' right of proof against the Association remains unimpaired. They have a right to prove for their whole debt against their principal debtors: see *In re Sass*. (1) The bank which has the largest claim, of 150,000*l*., has put in a proof in the winding-up of the Association. But the other two banks have not lodged proofs, presumably because there is nothing for the unsecured creditors to receive; but they have proved against Fenton's estate for the full amount of the several guarantees, and it seems that Fenton's estate will have to bear, as far as it is possible, the indebtedness of the Association; in other words, his estate will be depleted by a quota paid to the banks out of his estate. Luxmoore J. has held that as Fenton, the surety, is entitled to be repaid by the Association any sum which he, as surety, pays to the banks on behalf of the Association, his trustee may set off the amount for which proof against his estate has been made by the banks, against the proof lodged by the liquidator of the Association against his estate, on the principle of mutual dealings embodied in s. 31 of the Bankruptcy Act, 1914.

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(1) [1896] 2 Q. B. 12.

The liquidator of the Association appeals on the ground (*a*) that there was no mutual dealing, that the claim of the Association is a direct claim to be repaid sums due as debts from Fenton to the Association, and that the contra claim is not one for a debt due to Fenton, but only a contingent liability involving a right of protection against a liability incurred by Fenton towards the banks; a liability which he has not turned into a debt by paying off the banks, and (*b*) that the banks have a right of proof against the estate of the Association in liquidation and so, if Fenton's right against the Association is allowed by a set-off, it is in effect a second or double proof against the estate of the Association, and that by a well known rule in bankruptcy a double proof for the same debt is not permissible.

With regard to the first point taken before Luxmoore J., that Fenton must have received most of the money in respect of which the guarantees were given, and that consequently it would not be right to allow him the equitable relief of indemnity in respect of the guarantees, it is sufficient to say that I agree with the learned judge in rejecting that objection. Whether the money received by the Association from the banks passed into the hands of Fenton or not, makes no difference. The debt incurred to the banks was the debt of the Association.

The Association was liable as principal debtor. Fenton was surety, not a debtor directly liable to the banks.

The question of set-off by the trustee of the estate of Fenton, the surety, is more difficult. Neither Fenton nor his trustee has yet paid anything to the banks on behalf of the Association. Can the trustee claim, before payment, that a right of set-off under s. 31 has arisen? It must be remembered that set-off, under s. 31, is not optional. As Lord Selborne L.C. said in *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1): "It is a positive, absolute rule for the purpose of proof in bankruptcy, and nothing can be proved according to that rule in such cases except the balance of the account." As pointed out by Wright J. in *In re Daintrey* (2) Lord Selborne cannot have intended to refer to proof only, but to what is to be claimed or paid on either side. With that qualification Lord Selborne's observation as to set-off being a rule in bankruptcy and not merely a right which can be invoked at the will of the trustee, remains, and the question that is to be determined is whether that rule applies to the facts of the present case.

It is clear that a surety has a right to be protected against the liability that may fall upon him by the failure of the principal debtor to liquidate his debt; but this right, it is said, has its own distinctive character. It stands wholly apart from a liability for debts on the one side or the other, incurred by persons mutually dealing with each other in the course of business, and cannot be set off against them. It has been decided that a claim in detinue for the return of goods in specie cannot be set off against a money claim for a liquidated amount. The two things are incommensurable: see per Bowen L.J. in *Eberle's Hotels and Restaurant Co.* v. *Jonas.* (3)

The right of a surety to be protected from the liability that will fall upon him in case of default by the principal debtor is clear, and is not confined to cases in which he has paid the creditor. As soon as any definite sum of money has become payable to the creditor, the surety has a right to have it paid by the principal and his own liability in respect of it brought to an end: see the cases collected in Rowlatt on Principal and Surety, 2nd ed., p. 186, and the judgment of Swinfen Eady J. in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), and that of Wright J. in *Wolmershausen* v. *Gullick.* (2) The right, however, as pointed out in the latter case is for protection and does not enure to the surety so as to justify an order to pay him the sum for which he stands in peril; for the surety who has not paid the principal creditor cannot give a discharge as against the principal creditor. Money so paid to the surety might be employed by him for his own purposes and not paid over to discharge the debt due to the creditor. If the principal creditor had been a party to that action of *Wolmershausen* v. *Gullick* (2) it seems that Wright J. would have made an order that the co-surety, the defendant, should pay direct to the principal creditor, but not to the surety himself. This being the right of the surety it also seems clear that the time for ascertaining what mutual debts, credits and dealings were existing between the debtor and other persons is the date of the receiving order: see *In re Daintrey* (3) and the judgment of Lindley L.J. and the terms of the section hereinafter referred to.

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(1) (1884) 9 App. Cas. 434, 438.

(2) [1900] 1 Q. B. 546, 553.

(3) 18 Q. B. D. 459, 468.

What then were these mutual dealings when the equivalent of a receiving order was made, that is when the order for winding up the Association compulsorily was made on June 12, 1923? At that time there was a debt due to the Association from Fenton, and Fenton had the right to be protected against any claim made by the banks against him.

In *In re Parker* (4) it was decided that when one of two sureties had paid the creditor the whole of the debt and taken an assignment of the securities, he was entitled under s. 5 of the Mercantile Law Amendment Act, 1856, to bring an action against his co-surety, or to prove against his estate, as the assignee of the creditor, for the full amount of the debt, although he could only actually recover the proportion

(1) [1909] 2 Ch. 401.
(2) [1893] 2 Ch. 514.
(3) [1900] 1 Q. B. 546, 572.
(4) [1894] 3 Ch. 400.

which, as between the sureties, the co-surety was liable to pay. That decision is clear enough upon its facts. The bearing of it upon the present question is that Davey L.J. said (1): "What would have been the effect if the creditors had not proved their claim . . . ., and if the two sureties had brought in their claim in their own right against their co-surety for contribution, I do not say." He leaves it an open question.

In *In re Paine* (2) it was held that a surety who has a right of proof in respect of his contingent liability as surety is a creditor under the Bankruptcy Act—in that case it was under s. 37 of the Bankruptcy Act, 1883—and a payment therefore to, or for, his benefit, before he has been actually called upon to pay as surety, may be a fraudulent preference. That decision was followed by Buckley J. in *In re Blackpool Motor Car Co.* (3) Those decisions were as to who could be a creditor and be fraudulently preferred under s. 48 of the Act of 1883. They do not necessarily conclude the point that we have to determine which is not determined by any definite authority and has been, in several cases, expressly left open for subsequent decision. Thus in *Ex parte Whittaker* (4) two judges of great experience in bankruptcy law held that a surety who was under a contingent liability only had no right to vote at a meeting of creditors and decided this "even if the liability of a surety can be the subject of a proof before payment"—a point which Cave J. says was not settled by *In re Herepath & Delmar* (5), though at first sight that case, decided by Cave J., would appear to have involved the point. In *Ex parte Barrett* (6) Lord Westbury decided that where a surety, who was such before the winding-up, paid off the debt of his principal debtor after the winding-up and received the securities held by the creditor, he was entitled to be treated as being in the same position as if he had paid off the debt before the winding-up and to set off his payments so made, because he had fulfilled his contract made before

(1) [1894] 3 Ch. 407.
(2) [1897] 1 Q. B. 122.
(3) [1901] 1 Ch. 77.
(4) 63 L. T. 777.
(5) 7 Morr. 129.
(6) 13 W. R. 559.

the winding-up and his right arose not by reason of dealings after, but before the winding-up order. The Lord Chancellor clearly laid stress not only on the fact that the liability was outstanding at the date of the winding-up, but had in fact been fulfilled by payment which turned the surety into an actual creditor, and he was, therefore, no longer merely under a contingent liability.

Thus, so far as the cases go, it had been decided that a surety is entitled to a right to prove if (*a*) his liability arose under a guarantee given before the date of the receiving order or winding-up order, and (*b*) he has in fact paid to the creditors the sum that he seeks to set off. No case has decided that he can set off his contingent liability before he has changed that, by payment to the creditor, into an actual debt due to himself. Several cases have indicated a doubt whether there could be a right to prove before such a payment.

The mutual dealings section, s. 31, of the present Act follows the principle long since recognized and embodied in the successive statutes relating to bankruptcy from 4 & 5 Anne, c. 17, s. 11, onwards. They are collected in the judgment of Sir Nicholas Tindal C.J. in *Gibson* v. *Bell*. (1) The principle has been steadily enlarged, as I pointed out in *In re City Life Assurance Co.* (2)

It should be mentioned, however, that it was decided in 1820 that mutual credit does not cover a case of loss incurred by a contingency after the bankruptcy: see *Sampson* v. *Burton* (3), where Burrough J., quoting from the opinion of Gibbs C.J. in *Rose* v. *Hart* (4), says: " ' We think this shews that the legislature meant such credits only as must in their nature terminate in debt; as where a debt is due from one party and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side and a delivery of property with directions to turn it into money, on the other.' These

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(1) 1 Bing. (N. C.) 743.

(2) [1926] Ch. 191, 201.

(3) (1820) 2 Br. & B. 89, 96.

(4) 8 Taunt. 499, 506; 2 Sm. L. C., 12th ed., p. 276.

C. A.
1930
FENTON, *In re.*
FENTON TEXTILE ASSOCIATION, *Ex parte.*
Lord Hanworth M.R.

two cases taken together explain the intention of the statute. The intention was to confine mutual credit to pecuniary demands, or to those subjects, which at some subsequent time might become of a pecuniary nature."

To the words in previous Bankruptcy Acts, the Bankruptcy Act of 1869 added "mutual dealings" to the section, and we have to consider its exact terms to see whether a set-off can be allowed on such facts as are now present to the Court. If the contra right were one which was effective before the receiving order, though its quantum was measured afterwards, the system of set-off would apply: see *In re Daintrey* (1); *Ex parte Barrett* (2); and *Palmer* v. *Day & Sons* (3), where an authority given before the receiving order resulted in a money claim after the receiving order.

The terms of the present section (s. 31) follow the decision of *In re Daintrey* (4): "Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made"; and indicate that the debts or dealings contemplated must have been previous to the receiving order. Then the section directs that an "account shall be taken of what is due from the one party to the other in respect of such mutual dealings," and "the balance of the account, and no more," is to be claimed or paid on either side.

In *In re Daintrey* (4), when the datum line was fixed by the receiving order being made, it was clear, as Lord Lindley M.R. said, that very considerable sums would become payable under the agreement entered into between the parties before the date of the receiving order, that is, if the agreement was carried into effect according to the intention of the parties. It is true that there was no express obligation by Mant to carry on the business; but if he fulfilled his agreement, he would do so and thus provide a sum payable to the bankrupt. At the date of the judgment he had carried out his agreement and there was a sum of 300*l.* due to the bankrupt.

(1) [1900] 1 Q. B. 546, 572.
(2) 13 W. R. 559.
(3) [1895] 2 Q. B. 618.
(4) [1900] 1 Q. B. 546.

In the present case, as I have pointed out, the liability of Fenton at the date of the receiving order was uncertain, though he might have made his position certain by payment. The words of the section seem clearly to connote an account capable of ascertainment on either side if not immediately, yet based upon authority or liability definitely undertaken. I find it difficult to construe those words or adapt that system to dealings in which there was a debt on one side due to the other, and per contra there was not a debt or a certain liability, but one in respect of which there was a right of protection and no more ; a liability which could not be turned into a direct contra money claim, unless and until the debt had been paid by the surety, who then, and not till then, would become entitled to give a discharge for the sum paid to him. This he had not done at the date of the liquidation when his rights became determined.

Another difficulty remains to be considered. It will be observed that the latter part of the section provides that a right of set-off shall not accrue to a person when he had at the time of giving credit to the debtor, notice of an act of bankruptcy committed by the debtor and available against him. The right of set-off is thus fitted into the scheme of bankruptcy and made subject to an important rule and limitation which preserves the rights of the creditors inter se.

There is another rule which is well founded in bankruptcy, the rule against a double proof. The substance of it is expressed by Mellish L.J. in *In re Oriental Commercial Bank* (1) : "the true principle is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts." Now the debt in respect of which the set-off is claimed is the debt in respect of which the banks have a right of proof against the Association. They have a right under s. 65 and the rules to come in and tender a proof at any time before a dividend is declared and to be admitted to prove, subject to certain limits imposed by the rules. If two of the banks have not yet exercised their full rights of proof, that is

(1) L. R. 7 Ch. 99, 103.

because there appears to be nothing for the unsecured creditors to receive, but their right of proof exists. If the trustee of Fenton's estate were allowed to set off the debt due to the banks which Fenton guaranteed, he would exercise that right in respect of the same debt for which the largest creditor bank has already proved, and the other two can prove. It would in effect be a double proof. But it would be more : it would be an allowance to Fenton's estate in full of a debt due to another which Fenton has not paid himself; with the result that Fenton's general creditors would benefit to the extent of the debt which is primarily due from the Association to the banks. The rule, therefore, against double proof also prevents Fenton's trustee from setting off this liability of Fenton's to the banks which has not crystallized into a debt due to Fenton.

I desire to add that this judgment is not intended to determine that Fenton's trustee may not in some events have a provable debt within s. 30, sub-ss. 3 and 8, in the liquidation of the Association. It may be that he will; but when and at what value are questions that we have not to decide. Our judgment is that at the present time Fenton's trustee has not a right to set off his contingent liability under s. 31, which provides and requires a particular machinery for the set-off of mutual debts and does not conclude all the rights and questions that may arise.

The appeal will be allowed and the proof of 436,192*l.* will be admitted without reduction by set-off.

LAWRENCE L.J. On the first point taken by the appellant, that Fenton had no right to be indemnified by the Association in respect of his suretyship, because he misappropriated the money advanced by the banks, I agree with the decision of Luxmoore J. and have nothing to add to the reasons which he has given for arriving at his conclusion.

On the main point, however, which raises a difficult question, I have come to the conclusion that the appeal ought to succeed. The effect of allowing a set-off in the circumstances is that the estate of the insolvent surety will obtain from the estate of the insolvent principal debtor 20*s.* in the pound on the guaranteed debts, although neither the surety nor his trustee has paid anything to the principal creditors under the guarantees and although the estate of the principal debtor, after such set-off, will still remain liable for the full amount of the guaranteed debts. That cannot be right. The result would be still more extraordinary if (as might well have happened) there had been several other directors of the Association in the same position as Fenton. In that case, if the estate of each director could successfully have asserted the right of set-off now claimed on behalf of Fenton's estate, the effect would have been that the estate of the Association would have had to pay the amount of the banks' debts several times over in full, and yet have remained liable to the banks for those debts.

It is common ground that, as regards the question to be determined on the present appeal, the bankruptcy law and rules are applicable to the administration of the estates of both Fenton and the Association in the same manner as if Fenton and the Association had been debtors against whom receiving orders had been made.

The claim on behalf of Fenton's estate to the right of set-off is made under s. 31 of the Bankruptcy Act, 1914, and the question is whether that section enables the trustee of the estate of a bankrupt surety (in whose bankruptcy a proof has been lodged by the principal creditor) to set off the liability of the surety under his guarantee against a debt presently due from him to the trustee of the estate of the bankrupt principal debtor, although nothing has been paid to the principal creditor either by the surety or by his trustee.

The difficulty in the present case is entirely due to the fact that both the surety and the principal debtor are bankrupt; if either or both had been solvent different considerations would have arisen. It so happens that the estate of the principal debtor is insufficient to pay any dividend to his unsecured creditors and that the estate of the surety is expected to yield a dividend of about 1*s.* in the pound, but that fact does not, in my opinion, affect the question which we have to determine. The principle which has to be applied is the same whatever may be the degree of the insolvency of the two estates.

Although many cases have been decided under s. 31 and under the corresponding sections in the earlier Acts of 1869 and 1883, counsel have not been able to find a single case in which the Court has considered a claim to set off in circumstances similar to those prevailing in the present case.

The contention of the respondent may be summed up as follows: that all claims provable in bankruptcy, provided there is mutuality, are the subject of set-off, because the expression "mutual dealings" includes every case where there are provable claims on both sides; that the liability of a surety is a provable claim in the bankruptcy of the principal debtor although the surety may not have paid anything; and that, therefore, such a claim can properly be set off against a provable debt due from the surety to the principal debtor. The propositions so stated appear prima facie to accord with the authorities which have been cited and with the wide interpretation placed by the Courts on the expression "mutual debts, mutual credits or other mutual dealings."

It is unnecessary to examine the many cases in which under varying circumstances it has been decided what may and what may not be the subject of set-off under the section; it is enough for the purpose of this judgment to state generally (without attempting any exhaustive or precise enumeration) that it has been established that the claims must be commensurate (for instance, there can be no set-off of goods as against money); that the claims must be in the same right (for instance, a trustee cannot set off a debt due to him personally against a claim in respect of a fund in which he has no beneficial interest); that the claims must be between the same parties (for instance, a joint debt cannot be set off against a separate debt); and that claims provable in bankruptcy in respect of damages liquidated or unliquidated arising out of contract may be the subject of set-off.

It has also been decided that, although the date for ascertaining the existence of any mutual debts, credits or dealings which may be made the subject of set-off under the section is the date of the receiving order, yet it is sufficient if the account prescribed by the section can be taken when the set-off arises: see *In re Daintrey* (1), where the Court of Appeal allowed a set-off in respect of a debt whose existence and amount were alike unascertained at the date of the receiving order.

Further, it is not disputed by the appellant that a claim for indemnity by a surety, either against a co-surety or against the principal debtor, comes within the definition of a provable debt contained in s. 30 and that under s. 28 a bankrupt will be released from such a claim by the order of discharge. Moreover, there is ample authority for the general proposition that all provable debts resulting from mutual dealings are within s. 31: see per Brett M.R. in *Lee and Chapman's Case* (2); per Buckley L.J. in *In re Taylor* (3); and per Warrington L.J. in *In re City Life Assurance Co.* (4)

It has to be remembered, however, that the account which has to be taken under s. 31 is an account of what is due from the one party to the other in respect of the mutual dealings, and that only sums which are due from the one party are to be set off against sums due from the other party.

The question therefore is, whether (assuming that there were mutual dealings within the meaning of the section and assuming that there were provable debts on both sides resulting from such dealings) there was any sum due from the estate of the principal debtor to the estate of the surety at the time when the right to set off was claimed by the trustee of the surety, regard being had to the fact that at that time nothing had been paid by or on behalf of the surety to the principal creditors and the estate of the principal debtor was still liable for the whole amount of their debts.

The law as to the right of a surety to indemnity where the principal debtor is solvent is not in doubt. Until the surety

(1) [1900] 1 Q. B. 546.
(2) (1885) 30 Ch. D. 216, 222.
(3) [1910] 1 K. B. 562, 580.
(4) [1926] Ch. 191, 210.

is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all; until then a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the principal creditor: see per Parker J. in *In re Mitchell.* (1) The form which the order takes in such a case (as shown by *Wolmershausen* v. *Gullick* (2)) is a declaration of liability, followed by an order upon the principal debtor to pay or secure the debt. Even a solvent surety is not entitled to an order for payment to himself of the amount of the debt, as such a payment would not discharge the principal debtor from his liability to the principal creditor; much less is the trustee of a bankrupt surety entitled to any such payment, as the money paid to him by the principal debtor would be distributable amongst the general creditors of the surety leaving the principal debtor liable to pay the debt due to the principal creditor.

When, however, as in the present case, the principal debtor is bankrupt, the case assumes a different aspect. In such a case the claim of a surety, who has been called upon to pay but has not yet paid anything to the principal creditor, is in effect a claim for damages for the breach by the principal debtor of his obligation to indemnify his surety on the ground that his bankruptcy has rendered it impossible for him to perform his obligation and has made it possible to estimate the amount which the surety can properly claim by way of damages. The reason why, in my opinion, such a claim (although it apparently has the requisite attributes for a set-off under the section and although it is one from which the principal debtor would be released by the order of discharge) cannot be set off is because so long as the estate of the principal debtor remains liable to the principal creditor the surety will not be permitted to prove against the estate of the principal debtor, as such a proof would be a double proof for the same debt, and would therefore be inadmissible as being contrary to the established rule in bankruptcy.

(1) [1913] 1 Ch. 201, 206.

(2) [1893] 2 Ch. 514.

In the present case the surety has guaranteed the whole of the debts of the principal creditors, although he has limited his liability under each guarantee to a fixed amount. The effect of this is that the principal creditors have the right to prove against the estate of the principal debtor for the whole of their debts, and until they have received 20*s*. in the pound on those debts the surety cannot prove against the estate of the principal debtor, even although he may have paid the full amount for which he is liable under his guarantees: see *In re Sass.* (1) Even where the principal creditor has been paid in full partly by a dividend from the estate of the insolvent surety and partly by a dividend from the estate of the insolvent principal debtor, the trustee of the insolvent surety will not be allowed to prove against the estate of the principal debtor for the amount which the estate of the surety has contributed towards the payment of the debt, as it is only when the surety has paid the full amount of the debt that he will be subrogated to the rights of the principal creditor: see *In re Oriental Commercial Bank.* (2)

In the present case the largest in amount of the three principal creditors has lodged a proof in the winding-up of the principal debtor, and although the other two principal creditors have not lodged proofs they have been scheduled as creditors in the statement of affairs of the Association. Under s. 65 proofs may be lodged at any time before the estate is finally wound up and arrears of dividends, if any, may be recovered out of any moneys in hand, when the proofs are lodged, with the result that no claim by or on behalf of the surety would be admitted to proof even although two of the principal creditors have not in fact yet lodged any proofs in respect of their debts. To allow a set-off in respect of a claim which under the rules against double proof would not be admitted to proof would, in my opinion, be contrary to the principle upon which estates are administered in bankruptcy.

In these circumstances, I am of opinion that although the claim to indemnity by the trustee of Fenton's estate is a provable debt arising out of a mutual dealing between the

(1) [1896] 2 Q. B. 12.

(2) L. R. 7 Ch. 99, 102.

Association and Fenton, it cannot be set off against the debt due from Fenton's estate to the liquidator of the Association under s. 31, because the mutual dealing, at the time when the account under s. 31 has to be taken, has not by reason of the rule against double proof resulted in any sum becoming due from the Association to the trustee of Fenton's estate which could properly be entered on the debit side of the account.

I agree, therefore, that the appeal succeeds and should be allowed.

ROMER L.J. In order to solve the problem presented to us by this appeal it is essential in the first place to ascertain what would have been the respective rights of Henry Fenton and Fenton Textile Association, Ld., had both of them remained solvent. As to this the authorities leave no room for doubt. The Association had, of course, a right of action against Fenton for the 436,000*l.* odd. If Fenton had paid the banks the sum due to them he would have had a right of action against the Association for the money so paid, and if the Association had then sued him for the 436,000*l.* odd he would have been entitled to set off 166,795*l.* If, however, Fenton had not paid the banks, he would have had no right of set-off. The most he could have done would have been to counterclaim for an order upon the Association to pay or secure the amount due from them to the bank so as to indemnify him from his liability as guarantor, with liberty to apply in the event of non-payment: see *Wolmershausen* v. *Gullick* (1) and *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2) He could not have set off the amount of his liability to the banks, for that would have been equivalent to ordering payment to him of that amount by the Association, and, as pointed out by Wright J. in the earlier of the two cases I have referred to, no such order could have been made against the Association inasmuch as such a payment would not have given the Association a discharge as against the banks.

Let me now consider the case upon the supposition that Fenton became bankrupt, but the Association remained

(1) [1893] 2 Ch. 514.

(2) [1909] 2 Ch. 401.

solvent. The Association would then have had to prove for the 436,000*l.* in the bankruptcy. But could Fenton's trustee have set off his liability to the banks against such proof ? In my opinion he could not. That there were mutual dealings between the Association and Fenton resulting in the debt due to the Association on the one hand and the liability of the Association to indemnify Fenton against his liability to the banks on the other may be conceded. But there was nothing "due" from the Association to Fenton which could have been placed to Fenton's credit in the account that would have had to be taken under s. 31 of the Bankruptcy Act. A set-off would have been equivalent to a payment by the Association to Fenton's trustee for the general benefit of his creditors, leaving the Association still liable to the banks. The trustee's right against the Association could have been no greater than Fenton's before his bankruptcy. He could only have obtained an order upon the Association to discharge their indebtedness to the banks. That would have been the only way in which he could have compelled the Association to discharge their contingent liability to Fenton's estate.

But now it is necessary to consider how the position is affected by the fact that the Association is in liquidation and is insolvent. In that winding-up the rules of bankruptcy as to debts provable are applicable (s. 207 of the Companies (Consolidation) Act, 1908, now replaced by s. 262 of the Companies Act, 1929), including the rules as to set-off: see *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1) This no doubt creates a difficulty. For contingent liabilities are in general debts provable in bankruptcy, and it is well settled that, provided there be mutuality of dealings, claims provable may be set off.

The first question to be determined on this appeal, and one which if answered in the negative is in my opinion conclusive, is this. Is a claim by a surety, who has not paid off the principal creditor, in respect of the contingent liability to the surety of the principal debtor one that can be proved by the surety in the principal debtor's bankruptcy ? In

(1) 9 App. Cas. 434.

connection with this question our attention was called to the cases of *In re Paine* (1) and *In re Blackpool Motor Car Co.* (2) In both those cases the Court had in effect to consider whether a payment by the principal debtor to a surety who had not paid anything to the principal creditor could be avoided as a fraudulent preference in the subsequent bankruptcy of the principal debtor. That depended upon the meaning of the word "creditor" in s. 48 of the Bankruptcy Act, 1883. As to this, Vaughan Williams J. in the earlier case said (3): "I think . . . . that the word 'creditor' means any person who, at the date of the payment to him, would have had to come in and prove and rank with the other creditors in the bankruptcy. A surety would be such a person." He further said that the surety had a right to share in the distribution of the bankrupt's assets, and he held that the surety was therefore a creditor and that the payment to him was a fraudulent preference. In the later case (4) Buckley J. followed this decision. He said that the sureties in the case before him were persons who were under a contingent liability which could be the subject of proof. Now I do not doubt that these cases were rightly decided. When a principal debtor makes a payment to a surety who has not yet paid anything to the principal creditor in anticipation of and to provide against his subsequently being called upon to pay something to the principal creditor, I see no difficulty in treating the surety as a creditor for the purposes of the rule against fraudulent preference. For the word "creditor" may include a contingent creditor without doing any great violence to the language of the section, and a payment to him is obviously within the mischief of the statute. Should the surety subsequently pay off the principal creditor before the latter has lodged a proof, he would undoubtedly be able to prove in the bankruptcy, and if he paid the principal creditor off after the latter had lodged a proof, the dividends in respect of such proof would be made available for the surety. But I cannot agree that a surety who has not paid

(1) [1897] 1 Q. B. 122.
(2) [1901] 1 Ch. 77.
(3) [1897] 1 Q. B. 122, 124.
(4) [1901] 1 Ch. 77, 87.

off the principal creditor can prove in the bankruptcy of the principal debtor so as to share in the distribution of his assets unless the principal creditor has renounced in some way his right to lodge a proof himself while preserving, of course, his rights against the surety. To allow such a sharing in the assets would be to subject the assets to two claims in respect of the same debt, and this is contrary to the well established rule in bankruptcy against double proof.

In *In re Herepath & Delmar* (1) Cave J. did in fact allow a surety who had not paid the principal creditor to prove in the bankruptcy of the principal debtor. The point does not, however, appear to have been argued, it having been practically conceded in argument. Moreover, the same learned judge in the later case of *Ex parte Whittaker* (2) expressly stated that *In re Herepath & Delmar* (1) was not an authority in favour of the general right of a surety to prove in such circumstances.

There is indeed a direct authority against such a proof being allowed. In *In re Oriental Commercial Bank* (3) the holder of certain bills of exchange had proved for the amount due upon them in the liquidation of Company A that had accepted the bills and in that of Company B upon whose request the bills had been accepted, and who as between themselves and Company A were primarily liable for the amount. The holder of the bills received a dividend on each proof and in this way was paid in full. Company A then claimed to be entitled to receive a dividend out of the estate of Company B in respect of the sum that the holder of the bills had received out of the estate of Company A. It was held that the claim was not well founded, on the ground that to accede to it would be to subject the estate of Company B to a double dividend in respect of one and the same debt. In the present case, if Fenton, not having paid the banks anything under his guarantee, were entitled to prove in the winding-up of the Association, or if, having paid them less than the amount due to them, he were to prove

(1) 7 Morr. 129, 190.
(2) 63 L. T. 777.
(3) L. R. 7 Ch. 99.

for the amount so paid, and the banks were also to prove in the winding-up of the Association for the full sum due to them, as they would be entitled to do, the estate of the Association would be subjected to more than one proof in respect of the same debt, and this is not permissible. The claim of Fenton against the Association in either case would be a claim in respect of the same debt as that claimed by the banks. In both cases the claim of Fenton would come within the definition of debts provable in bankruptcy contained in s. 30 of the Bankruptcy Act. But so does the claim of the banks, and the only reason why Fenton is prevented from proving his claim is that his claim is in respect of the same debt as is that of the banks, and as between him and the banks the latter have the prior right of proof.

I am accordingly of opinion that the claim of Fenton's trustee cannot be proved in the liquidation of the Association, there being no evidence that the banks have in any way renounced their right to prove. We are indeed told that in the case of the bank with the largest claim a proof has actually been lodged.

The claim of Fenton's trustee not being in the circumstances provable in the winding-up of the Association, it follows that it cannot be set off against the claim of the Association in respect of the 436,000*l.*

There is only one other matter that I need mention. Where a principal debtor becomes bankrupt and the dividend received from his estate and what is recovered by the principal creditor from the surety are together insufficient to pay the principal creditor in full, it is quite clear that the effect of the discharge of the principal debtor is to release him from all further liability to the surety in respect of what the surety has paid or is liable to pay. If that be so, it is said, the claim of the surety must be provable in bankruptcy. But the fallacy in this argument consists in forgetting that the claim of the surety and the claim of the principal creditor are in respect of the same debt. The discharge of the principal debtor releases him from the debt because it is a debt which is provable in his bankruptcy, but one which is in fact proved by the principal creditor. This is no doubt a hardship upon the surety. But it is one that he has brought upon himself by becoming surety for the debts of a person who is unable to pay them as they fall due.

For the reasons I have given, this appeal must in my judgment be allowed.

With regard to the other point taken before Luxmoore J., based upon the misappropriation by Fenton of the moneys advanced by the banks to the Association, I entirely concur with the decision of the learned judge.

Appeal allowed.

Solicitors for appellant: *Stephenson, Harwood & Tatham.*

Solicitors for respondent: *Blundell, Baker & Co., for Mumfords & Gordons, Bradford.*

W. I. C.

ATTORNEY-GENERAL *v.* SHARP.

[1929. A. 1491.]

C. A.
1930
June 26, 27.

Local Government—Licensing Authority—Motor Omnibuses—Plying for Hire without Licence—Statutory Offence—Penalty—Whether Sole Remedy—Action by Attorney-General—Injunction—Manchester Police Regulation Act, 1844 (7 *&* 8 *Vict. c. xl.*).

By the Manchester Police Regulation Act, 1844, the Manchester Corporation, who were the licensing authority for the City of Manchester, were empowered by the Act to license hackney carriages (including motor omnibuses) plying for hire within the city. The Act provided for penalties for plying for hire without a licence. The defendant, who was the owner or proprietor of motor omnibuses, had applied for and had been refused a licence by the Corporation. He had nevertheless continued to ply for hire in the City with his motor omnibuses, and he and his employees had been repeatedly fined for offences under the Act. In an action brought by the Attorney-General at the relation of the Corporation for an injunction to restrain the defendant from continuing to ply for hire in the City without a licence:—

Held, that inasmuch as the rights of the public were involved by the action of the defendant, and as the remedies provided by the Act had proved to be ineffective, the Court had jurisdiction to grant the injunction at the instance of the Attorney-General by way of ancillary relief.

C. A.
1930
ATTORNEY-GENERAL v. SHARP.

APPEAL from a decision of Farwell J.

The action was brought by the Attorney-General at the relation of the Manchester Corporation for an injunction to restrain the defendant, a motor omnibus proprietor, from causing or permitting any of his motor omnibuses to be used as motor omnibuses plying for hire within the City of Manchester without the same being duly licensed.

The Corporation were both the highway and licensing authority of the City of Manchester, and as such had power to grant licences for hackney carriages (including motor omnibuses) plying for hire within the City under the provisions of the Manchester Police Regulation Act, 1844 (7 & 8 Vict. c. xl.).

The following statement of the facts is taken from the judgment of the Master of the Rolls:—

"In the year 1844 an Act was passed called the Manchester Police Regulation Act. It is entituled 'An Act for the good government and police regulation of the Borough of Manchester,' and by s. 282 it is enacted that the Act shall be a public Act, and shall be judicially taken notice of as such. The Act was passed for the purpose of giving power to the proper local authority, which is now the Lord Mayor and Corporation of the City of Manchester, to enforce those powers and regulations which are necessary for the good government of a large body of inhabitants such as is found resident within the boundaries of the City of Manchester. The Act covers all sorts of matters which are well known, sanitary matters and matters like the regulation of slaughter-houses, and all the usual subjects which must be dealt with in the interests of the community at large by a central authority. But, incidentally, it contains a power to license what are called hackney carriages or carts. There is a little fasciculus of sections dealing with these, beginning at s. 139, which gives power to the Council from time to time to license 'such number of hackney carriages and carts of any kind or description, to ply for hire within the Borough, as they shall think fit,' and (s. 140) to revoke the licence for misconduct. Sect. 141 illustrates the manner in which the licences are to be applied for, and s. 142 states what is to be specified in the licences. The Act also provides (s. 146) that the persons who are driving shall themselves hold licences. The words 'hackney carriage' are defined by the interpretation clause (s. 280) to include 'any coach, omnibus, chariot, fly, car, cabriolet, gig, sociable, lorry or such like carriage.' By s. 145 there is a penalty imposed on persons plying with hackney carriages without a borough or township licence.

"What has happened is this. The defendant is the owner or the proprietor of motor omnibuses. He has two motor garages within the City of Manchester, the Lena Street garage and the Stockport Road garage. The defendant has also a garage within the area of Eccles, which is an area independent of the City of Manchester, and in that area he holds a licence to ply for hire with his motor omnibuses. He also has a garage within the area of Hazel Grove and Bramhall Urban District, and in that district also he holds licences for the purpose of plying for hire with his omnibuses. It appears that it is possible, as he is the holder of such licences, for him to start an omnibus containing some of the persons who get in at Eccles or who get in at Hazel Grove and Bramhall, and to drive them into the City of Manchester, and, after they have spent such time as they are pleased to do within the City boundaries, to take them back again to Eccles or Hazel Grove, as the case may be. He has also ticket offices at these garages that are within the City of Manchester, the Lena Street garage and the Stockport Road garage, and he has from time to time issued tickets which enable persons who do not start either from Eccles or from Hazel Grove and Bramhall to take a seat in his motor omnibuses which are then within the boundaries of the City of Manchester.

"Farwell J. who had the facts before him has held that the defendant was plying for hire with his omnibuses within the City of Manchester, and from that finding of fact Mr. Manning has not urged any point for this Court of Appeal. The point, however, upon the question of fact is, I understand, intended to be kept open by him should he require at any other time to argue it. The learned judge granted an injunction against the defendant plying for hire within the boundaries of the City of Manchester on the ground that he was in what he was doing acting in contravention of the Manchester Police Regulation Act, 1844, to which I have referred. From that injunction the defendant appeals, on the ground that no remedy lies by an injunction, but that the only remedies for the enforcement of the Act are those which are specially appointed as the appropriate remedies—namely, those which are indicated under s. 145 of the Act. The question that we have to determine, therefore, is whether or not it is possible to grant an injunction upon these facts, or whether the defendant's point is good that the sole sanction for the enforcement of that remedy on which the Act rests is the penalty which is imposed by s. 145. There is one more fact to which I must call attention. It is admitted by the defendant that he has been convicted under the section to which I have referred and that a penalty has been imposed upon him no less than forty-eight times. We are also told that his employees, who are the drivers of the 'buses, have been convicted or had penalties imposed upon them on no less than twelve occasions. Added together, that shows that attempts have been made on sixty occasions to enforce compliance with the terms of this Act, but without effective result. The defendant still continues to act as he has done previously, and I understand that the position is this. The fines imposed are so much, and the business which the defendant does is so much; and it may well be that he can bear the burden of the fines which are imposed upon him and yet continue to make a profit by his business while neglecting to observe the directions and regulations which are imposed by the Act."

The defendant appealed. The appeal was heard on June 26 and 27, 1930.

Manning K.C. and *R. W. Leach* for the appellant. This action is brought in respect of a statutory offence created for the first time by the Manchester Police Regulation Act, 1844, ss. 139 to 143, and by s. 145 the penalty of a fine was imposed for the offence. That being so, the Court has no jurisdiction to grant any other remedy, and Farwell J. had no jurisdiction to grant an injunction in this case. The point was not seriously considered by Farwell J., as he contented himself with following a decision of Romer J. on a similar question in *Attorney-General* v. *Dale.* (1) We contend that there is no jurisdiction to grant an injunction to prevent the commission of an offence created by statute for which the statute provides a remedy, except in defence of a right of property: *Cooper* v. *Whittingham* (2); *Stevens* v. *Chown.* (3) Those were both cases within the exception, but the principle applicable is clear. In *Attorney-General* v. *Ashborne Recreation Ground Co.* (4) it was held that an injunction would be granted in an action brought by the Attorney-General at the relation of the local authority to prevent a breach of a by-law made under the Public Health Act, 1875, although a penalty was prescribed for infringement. But there the object of the action was to prevent a permanent obstruction of a highway by laying out a new street of less than the prescribed width.

[LAWRENCE L.J. That case seems to decide that where any public right is injuriously affected, the Attorney-General can obtain an injunction at the relation of the local authority.]

It is submitted that the decision was not so wide. The present action is not brought to protect any property or right, but merely to enforce a provision relating to the management of highways by the Manchester Corporation.

[LORD HANWORTH M.R. referred to *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (5)]

That was not a case where a new offence had been created by statute for which the statute provided a remedy.

[LORD HANWORTH M.R. I infer that in the present case the defendant finds it worth his while to pay numerous fines for running his motor 'buses through Manchester. If so,

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(1) Unreported (decided Oct. 17, 1928).

(2) (1880) 15 Ch. D. 501, 506.

(3) [1901] 1 Ch. 894.

(4) [1903] 1 Ch. 101.

(5) (1882) 21 Ch. D. 752.

C. A.
1930

Attorney-General v. Sharp.

there is no effective way of enforcing the law except by the present proceedings.]

This case is exactly within the principle of *Institute of Patent Agents* v. *Lockwood* (1), and it shows that there is no jurisdiction to grant an injunction in a case where a remedy has been provided by the statute creating the offence.

[Lawrence L.J. That was not an action by the Attorney-General to enforce a public right.]

The law applicable is the same. There is no case in the books of the Court intervening by injunction merely to prevent overcrowding of the streets. The offence under the Manchester Police Regulation Act, 1844, is an offence against the Manchester Corporation as the licensing authority and not as highway authority; and the relators, being relators in the character of licensing authority, cannot base their claim to an injunction on obstruction of the highway, as in *Attorney-General* v. *Ashborne Recreation Ground Co.* (2)

Grant K.C. and *E. H. Longson* for the respondent. Until now, no one has had the courage since the determination of *Attorney-General* v. *Wimbledon House Estate Co.* (3) in 1904 to contend that, when the Attorney-General is invoked by a local authority to prevent breaches of by-laws, there is not jurisdiction to grant an injunction. The decision in that case did not depend on any obstruction of the highway, for the claim was to prevent private owners from building on their own property in advance of the building line. There, as here, a breach had been committed of a provision in a public general Act for which a penalty was prescribed by the Act; but it was held that an injunction would lie at the suit of the Attorney-General on behalf of the public to restrain the breach. *Devonport Corporation* v. *Tozer* (4) recognized the same principle, but there the action was held not to be maintainable because the Attorney-General was absent. That was the true principle of *Attorney-General* v. *Ashborne Recreation Ground Co.* (2), which was approved in

(1) [1894] A. C. 347, 363.
(2) [1903] 1 Ch. 101.
(3) [1904] 2 Ch. 34.
(4) [1903] 1 Ch. 759.

both the latter cases. The respondents rely on the statement of Buckley J. in the latter case (1), which it is submitted is good law that: "The Attorney-General suing in respect of an invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his rights."

[LORD HANWORTH M.R. That case was approved of in *Devonport Corporation* v. *Tozer*. (2)]

Here the Act of 1844 was passed for the good government of the City of Manchester. The defendant has set its provisions at naught, and the public is therefore obviously interested.

[LORD HANWORTH M.R. referred to *Attorney-General* v. *Merthyr Tydfil Union*. (3)]

[They were stopped.]

Manning K.C. in reply. In *Attorney-General* v. *Ely, Haddenham and Sutton Ry. Co.* (4), Lord Hatherley L.C. said: "As to the argument that the Attorney-General represents the whole public, he represents the whole public in this sense, that he asks that right may be done and the law observed. . . . . The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed." Those observations were made with reference to the interference with the rights of the public over a highway. The case is quite unlike the present, where the offence is created for the first time by the Act of 1844 and the Act itself provides the penalty for its commission.

Some limit must be placed on the jurisdiction of the Court to restrain by injunction the commission of offences under the Act.

[LAWRENCE L.J. The Attorney-General has to give his fiat in each case.]

The Court has no jurisdiction to interfere by injunction with the commission of statutory offences, but must leave the parties affected to their statutory remedies.

(1) [1903] 1 Ch. 101, 107.
(2) [1903] 1 Ch. 759.
(3) [1900] 1 Ch. 516, 550.
(4) (1869) L. R. 4 Ch. 194, 199.

The Act has in some cases provided for punishment by imprisonment.

If the Court grants the injunction asked, it will be imposing an additional penalty in the case of disobedience to that provided by the Legislature: *Institute of Patent Agents* v. *Lockwood.* (1)

[LORD HANWORTH M.R. There the action was at the instance of the Institute of Patent Agents and not at that of the Attorney-General.]

LORD HANWORTH M.R. stated the facts as set out above and continued: In these circumstances this action is brought. It is an action by His Majesty's Attorney-General on the relation of the Lord Mayor and Aldermen and Citizens of the City of Manchester. The nature of the action must not be overlooked, as was said by Farwell J. in *Attorney-General* v. *Wimbledon House Estate Co.* (2) He there pointed out that it was an action brought by the Attorney-General, "and it is not the less the Attorney-General's action because it is on the relation of the urban district council, who are joined as relators merely in order to hold them liable for costs." An action by the Attorney-General has special characteristics. It is brought after a fiat has been obtained from the Attorney-General. He can refuse or grant his fiat at his discretion. It is an important discretion which is entrusted to him as the first Law Officer of the Crown. The nature of the jurisdiction which he exercises is referred to by Lord Halsbury L.C. in *London County Council* v. *Attorney-General* (3), where he points out that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in respect of the matters submitted to him or not, and that his discretion cannot be canvassed in the Court. "It is a question which the law of this country," so says Lord Halsbury, "has made to reside exclusively in the Attorney-General." I have called attention to the observations of Farwell J. and of Lord Halsbury for the purpose of emphasizing the quality and nature of

(1) [1894] A. C. 347, 361.
(2) [1904] 2 Ch. 34, 39.
(3) [1902] A. C. 165, 168, 169.

this action. The Attorney-General has a duty, if called upon or matters are brought to his notice, to enforce public rights. I am reading from a passage which is to be found in Halsbury's Laws of England, vol. xxvii., p. 191: "In addition to the common law remedy of indictment, and any specific remedies provided by the statute in question, the Attorney-General may at any time apply to the High Court to exercise its equitable jurisdiction of granting an injunction against the breach of a statutory duty or the infringement or threatened infringement of a public right, and an individual who, save as one of the public, has sustained no special damage can only do so in the Attorney-General's name." I think that passage is correct. It is true, I think, that the Attorney-General can bring by his action before the Court a case in which it is necessary to ask for the intervention of the Court for the enforcement of public rights in addition to some procedure which the statute allows against individual breakers of the regulations. In the present case the Attorney-General says that the sanction which has been given under this Act has proved wholly ineffective for the purpose of maintaining the duty which the Act is intended to enforce. Where such is the case, as was pointed out by Lindley M.R. in *Attorney-General* v. *Merthyr Tydfil Union* (1), where there is no adequate remedy, the jurisdiction of the High Court to grant an injunction cannot be doubted; the High Court will come to the assistance of the Attorney-General as a public authority to give the ancillary remedy which is necessary to enforce public rights. In *Attorney-General* v. *Merthyr Tydfil Union* (1) the point was argued that there was no power to grant an injunction because there were other remedies, and as there was no power to grant an injunction there could be no power to make a declaration. That point was definitely brought and fully argued before the Court, but the Court determined that it could make a declaration, just as it could have granted an injunction, because it was necessary that that injunction should be granted in order that there should be an adequate

(1) [1900] 1 Ch. 516.

remedy. But the matter does not rest there. We are not here dealing with private rights but with the question of the public right brought to the attention of the Court by the Attorney-General. In *Attorney-General* v. *Ashborne Recreation Ground Co.* (1) Buckley J. (now Lord Wrenbury) gives a judgment in which he definitely shows that the Court has jurisdiction to enforce by-laws by an injunction in an action brought by the Attorney-General at the relation of the local authority. He says (2): "The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his rights," and he mentions a number of cases as illustrations of the case where that procedure has been regularly and properly followed. He adds (3): "Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws." The appropriateness of that observation would appear clear from the facts of the present case. That decision of Buckley J. was commented upon in *Devonport Corporation* v. *Tozer* (4) which came before the Court of Appeal. Collins M.R. there says (5): "These proceedings are not taken for the penalty imposed by the by-laws. They are taken on the general right of a public body who are trying to put in suit a claim for the breach of a statute. This point has been carefully considered by Buckley J. in a very elaborate judgment in the case of *Attorney-General* v. *Ashborne Recreation Ground Co.* (1), in which he has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add anything to the reasons there given, namely, that where there is a public wrong, and where the local authority who have certain special rights to sue in their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General." It is plain from those observations that Collins M.R. is approving of the judgment —as he calls it, the "elaborate judgment"—of Buckley J. who had pointed out the right of the Attorney-General to come to the Court for the purpose of obtaining an injunction.

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(1) [1903] 1 Ch. 101.

(2) Ibid. 107.

(3) [1903] 1 Ch. 108.

(4) Ibid. 759.

(5) [1903] 1 Ch. 762.

Another case must be also referred to: that is the *Attorney-General* v. *Wimbledon House Estate Co.* (1) That was an action by the Attorney-General, and was for the purpose of enforcing a building line and preventing an infringement of it. Farwell J. there pointed out that the defendants had been prosecuted before the magistrates and had been convicted and had been fined. Then he added (2): "There is, first of all, the statutory obligation not to build without the written consent, and if that is disobeyed—apart from any question of penalty—there is a remedy by injunction, because it is a public general Act prohibiting certain matters in the interests of public health and in order to preserve uniformity in the width of the public streets, and that is a matter for which the Attorney-General can sue. Then the next point taken is that, inasmuch as the defendants have already been fined by the magistrates, they cannot now be attacked by the Attorney-General. In my opinion that is a misapprehension. The penalty imposed is a penalty which can be, and has been according to one of the reported cases (3), imposed time after time if the offence is continued." Then he proceeds to say that although that may be so, the Attorney-General is entitled, quite apart from what I might call the individual remedy, to enforce the public rights which are enshrined in the Act which is the subject-matter of the proceedings.

There are one or two more cases to which reference has been made, but they all follow the same lines. Even in *Attorney-General* v. *Ely, Haddenham and Sutton Ry. Co.* (4) Lord Hatherley says: "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed." Again, in *Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (1) the headnote says: "When an illegal act is being committed, which in its nature tends to the injury of the public . . . . the Attorney-General can maintain an action on behalf of the public to restrain the commission of the act." Fry J. in his judgment says (2): "This is clearly a case in which the defendant company without any power (for their powers had come to an end) thought fit to do certain acts which undoubtedly tended in their nature to interfere with public rights, and so tended to injure the public." Then the Attorney-General, as he points out, can intervene and interfere. We are not considering cases such as those where private rights alone are concerned, but it may be pointed out that in *Stevens* v. *Chown* (3), where although there was a particular remedy provided in respect of the infringement of a right of property, still Farwell J. held that the jurisdiction of the High Court to protect that right by injunction was not excluded by the particular remedy, inasmuch as the statute had not expressly said that the duties imposed under the statute were to be enforced solely and exclusively by the particular remedy given.

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(1) [1904] 2 Ch. 34.
(2) Ibid. 34, 41.
(3) See *Rumball* v. *Schmidt* (1882) 8 Q. B. D. 603.
(4) L. R. 4 Ch. 194, 199.

Having regard to the terms of these cases which we have looked at, it appears quite clear that in a case where a public right has been or is likely to be infringed the Attorney-General can bring an action if in his discretion he thinks it is a right course to follow, and then he can apply in that action for the ancillary remedy of an injunction to be granted by the Court in order that by that powerful weapon there may be steps taken which will enforce the public right, inasmuch as without it the particular sanction given as against the individual, as in this case under s. 145, would be or has proved insufficient.

(1) 21 Ch. D. 752.
(2) 21 Ch. D. 754.
(3) [1901] 1 Ch. 894.

It appears therefore upon the point which Mr. Manning has taken—an interesting point, too—that we must hold that there is a remedy by injunction and that the mere fact that the imposition of a fine is available under the statute does not exclude the right which is sought by the Attorney-General.

For these reasons the appeal must be dismissed with costs.

Lawrence L.J. I agree. The only question which Mr. Manning has asked this Court to decide on the present occasion is whether Farwell J. had jurisdiction to grant an injunction to restrain the defendant from using his motor omnibuses as omnibuses plying for hire in the City of Manchester without being duly licensed for that purpose, in breach of the provisions of a public Act passed in the year 1844 entitled " An Act for the good government and police regulation of the Borough of Manchester." The action is brought by the Attorney-General on the relation of the Corporation of Manchester, which happens to be both the licensing authority and the highway authority, although this fact is in my opinion immaterial. If the learned judge had jurisdiction, it cannot, I think, be reasonably open to doubt that it was rightly exercised in the circumstances of the present case. The defendant has deliberately and persistently committed breaches of the statutory obligations imposed upon him for the benefit of the public. Before this action was brought the defendant and his employees had, at the instance of the Corporation of Manchester, been summoned and fined no less than sixty times for breaches of these obligations, and it is plain that the defendant intends to pursue his illegal course of conduct unless restrained by injunction. Mr. Manning contended that as the Act created a new liability and prescribed the remedy and as no interference with any right of property was involved, the Court had no jurisdiction to grant an injunction. The cases relied upon in support of this contention, such as *Cooper* v. *Whittingham* (1); *Stevens* v. *Chown* (2); and *Institute of Patent Agents* v.

(1) 15 Ch. D. 501.

(2) [1901] 1 Ch. 894.

Lockwood (1) are cases in which the action was brought, not by the Attorney-General suing on behalf of the public, but by some individual person or body aggrieved by the breach of the statutory obligation. In such cases, no doubt, the proposition relied upon by Mr. Manning has an important bearing on the question whether the Court has jurisdiction to grant an injunction, but in my opinion it has no application to a case where the Attorney-General is suing on behalf of the public. There is a large body of authority showing the distinction between the two classes of cases, and without attempting to review all the decisions on this subject I will briefly refer to some of the cases cited at the Bar which in my judgment are amply sufficient to show that it is firmly established that the Court has jurisdiction to restrain an illegal act of a public nature at the instance of the Attorney-General suing on behalf of the public, although the illegal act does not constitute an invasion of any right of property and although the Act imposing the new liability prescribes the remedy for its breach.

In *Attorney-General* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (2) Sir John Romilly M.R. granted an injunction at the instance of the Attorney-General to restrain the opening of a railway not authorized by the Board of Trade, and in the course of his judgment said that the Attorney-General "might apply to the Court to restrain the execution of an illegal act of a public nature, provided it was established that the act was an illegal act, and it affected the public generally." In *Attorney-General* v. *Ely, Haddenham and Sutton Ry. Co.* (3) Lord Hatherley L.C. in giving judgment said the Attorney-General "represents the whole public in this sense, that he asks that right may be done and the law observed. . . . . The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed." In *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (4) Fry J. considered the last mentioned two cases and, following the dicta which I have quoted, held that an action by the Attorney-General for an injunction to restrain the defendants from proceeding with certain works contrary to their statutory authorization would lie and consequently that the relators were entitled to their costs. In *Attorney-General* v. *Ashborne Recreation Ground Co.* (1) an injunction was sought by the Attorney-General to restrain the infringement of certain by-laws made by a local authority under the Public Health Act. The by-laws imposed a penalty for any breach, and the question arose whether an action could be maintained by the Attorney-General to restrain their infringement. Buckley J. after referring to some of the authorities, said (2): "The Attorney-General suing in respect of the invasion of public rights has at least as large a right to invoke the protection of the Court as a private owner suing in respect of his rights. Judges, both of first instance and of the Court of Appeal, although the point has apparently not always been taken, have assumed and North J. has decided that in such cases the Attorney-General can sue." The learned judge then instanced several cases in which the Attorney-General had sued and proceeded (3): "Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made by-laws." Then a little later, after referring by way of example to s. 23 of the Public Health Acts Amendment Act, 1890, under which by-laws might be made as to such things as the sufficient supply of water for flushing closets, the learned judge said (4): "The Act did not intend that the public right to have these things done should be guarded only by a penalty in case they are not done."

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(1) [1894] A. C. 347.

(2) (1854) 2 W. R. 330, 331.

(3) L. R. 4 Ch. 194, 199.

(4) 21 Ch. D. 752.

The last mentioned case was considered and approved by the Court of Appeal in *Devonport Corporation* v. *Tozer* (5), the decision in which brings out clearly the distinction between actions brought by the Attorney-General suing on behalf of

(1) [1903] 1 Ch. 101.
(2) Ibid. 101, 107.
(3) [1903] 1 Ch. 108.
(4) Ibid. 109.
(5) [1903] 1 Ch. 759.

the public and actions brought by an individual person or body. There the Devonport Corporation were the plaintiffs and the Court, in refusing an injunction, pointed out that if they had desired to obtain an injunction they should have invoked the aid of the Attorney-General. Collins M.R. said (1): "These proceedings are not taken for the penalty imposed by the by-laws. They are taken on the general right of a public body who are trying to put in suit a claim for the breach of a statute. This point has been carefully considered by Buckley J. in a very elaborate judgment in the case of *Attorney-General* v. *Ashborne Recreation Ground Co.* (2), in which he has covered the whole of the law, as it seems to me, upon this point. I do not think I could usefully add anything to the reasons there given, namely, that where there is a public wrong, and where the local authority who have certain special rights to sue in their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognized way, namely, at the suit of the Attorney-General. In this case the plaintiffs have attempted to do it without the intervention of the Attorney-General, and, for the reasons given by Buckley J. in the case I have mentioned, I am of opinion that they cannot proceed in the absence of the Attorney-General."

The last case to which I will refer is *Attorney-General* v. *Wimbledon House Estate Co.* (3) In that case the defendants had infringed a by-law by erecting a building which projected beyond the building line. They had been summoned and fined 20*l.* in respect of that infringement. An action was then brought by the Attorney-General for a mandatory injunction to pull down the offending building. Farwell J. in granting the injunction negatived the contention that as the defendants had been fined no injunction ought to be granted and decided that an action by the Attorney-General would lie, and was the appropriate remedy in the circumstances. Mr. Manning contended that that case was

(1) [1903] 1 Ch. 762.

(2) [1903] 1 Ch. 101.

(3) [1904] 2 Ch. 34.

distinguishable from the present on the ground that there the illegal act had resulted in a permanent infringement of the statutory provisions whereas in the present case the illegal acts of the defendant were merely temporary infringements of the Act in question. In my judgment the distinction thus sought to be drawn does not assist the defendant. There is no ground for suggesting that Farwell J. intended to hold that the jurisdiction of the Court to grant an injunction was confined to cases where the illegal act was complete and resulted in a permanent infringement of a statutory provision. In my opinion the decision in that case shows that the learned judge recognized the jurisdiction and held that in the circumstances the Court ought to exercise it. In the present case moreover the defendant is wilfully persisting in an illegal course of conduct which has become and if no injunction be granted will continue to be a permanent habit. In these circumstances I think that the only appropriate remedy is by way of injunction at the instance of the Attorney-General.

The cases to which I have referred—and there are many others—in my judgment negative the proposition submitted on behalf of the plaintiffs that in an action brought by the Attorney-General the Court has no jurisdiction to grant an injunction to restrain the breach of a public statute which creates a new obligation and prescribes the remedy unless it be shown that the breach is one which involves the invasion of some right of property.

I therefore agree that the appeal should be dismissed.

ROMER L.J. I agree and do not wish to add anything.

Appeal dismissed.

Solicitors for appellant: *Rochester Pusey & Co., for T. A. Needham, Manchester.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for F. E. Warbreck Howell, Town Clerk, Manchester.*

W. I. C.

CLAUSON
and
LUXMOORE
JJ.

1930
July 7.

In re HARRIS.

[10 of 1930.]

Bankruptcy—High Bailiff—Notice of Bankruptcy Petition—Service—High Bailiff with Knowledge of Petition acquired as Registrar deemed served with Notice—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 41, *sub-s.* 2.

The condition of service within the fourteen days limited by s. 41, sub-s. 2, of the Bankruptcy Act, 1914, of notice on the sheriff of a bankruptcy petition having been presented is sufficiently complied with, so as to entitle the official receiver to be paid the moneys retained by the sheriff, if during that period he has acquired knowledge of the presentation of a petition.

M., who held the office of high bailiff of a county court, in pursuance of s. 41, sub-s. 2, of the Bankruptcy Act, 1914, retained the moneys paid to him to avoid a sale of the debtor's goods. Before the expiration of the prescribed period of retention a bankruptcy petition was presented by the debtor and a receiving order thereon was signed by M., who then held the office of registrar of the same court of which he was also high bailiff. A formal notice in writing was sent by the official receiver to M. of the presentation of the petition and of the making of the receiving order, which was not received until after the fourteen days had expired:—

Held, that knowledge of the presentation of the petition acquired by M. as registrar constituted a sufficient compliance with the requirement of s. 41, sub-s. 2, of service of notice upon him as high bailiff, with the result that the official receiver was entitled to be paid the moneys in the hands of the high bailiff.

Appeal from Plymouth County Court.

On February 11, 1930, Shell-Mex, Ld., obtained judgment against the debtor in the Plymouth County Court for the sum of 77*l.* 7*s.* 1*d.* The judgment creditors proceeded to execution, and on February 25 the sum of 78*l.* 8*s.* 1*d.* in respect of the judgment and the issue of execution and possession fees was, in order to avoid a sale of the debtor's goods under a warrant of execution, paid to Mr. McCrea, the high bailiff of the court, who for the purposes of the Bankruptcy Act, 1914, was included under the term "sheriff": see s. 167. (1)

On February 26 notice was given by Mr. McCrea to the execution creditors' solicitors of his receipt of that sum, and that it would be retained pursuant to s. 41, sub-s. 2, of the Bankruptcy Act, 1914 (1), for fourteen days.

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(1) Sect. 167: "'Sheriff' includes any officer charged with the execution of a writ or other process."

On March 11 the debtor filed a petition in bankruptcy, and on the same day a receiving order was made against the debtor and he was adjudicated bankrupt, and the official receiver was appointed interim receiver of the debtor's property. That receiving order was signed by Mr. McCrea, the registrar of the court, who at that time occupied the office of high bailiff of the same court.

On March 12 the official receiver gave formal notice in writing to Mr. McCrea of the petition having been presented and of the receiving order, and claimed payment of all moneys in his hands as forming part of the bankrupt's property.

Upon the application by motion of the execution creditors that the moneys in the possession of the high bailiff in the action of *Shell-Mex, Ld.* v. *Harris* should be ordered to be paid out to them, the county court judge on April 3, 1930, dismissed the application, and ordered that the moneys should be paid out to the official receiver.

Tindale Davis for the appellants. Service of notice on the high bailiff required by s. 41, sub-s. 2, of the Act, has not been satisfied, therefore the execution creditors were entitled to be paid the moneys in his hands. The knowledge acquired by Mr. McCrea as registrar of presentation of the petition could not affect him in his capacity of high bailiff, nor was the knowledge so gained equivalent to service of notice.

Roland Burrows for the official receiver. Notice however acquired by the high bailiff is sufficient to entitle the official receiver to the moneys. Rule 13 of the Bankruptcy Rules, 1915, provides that "all notices required by the Act or these rules shall be in writing, unless these Rules otherwise provide or the Court shall in any particular case otherwise order." Notwithstanding a corresponding rule in the same language it was held by Grove J. in *Curtis* v. *Wainbrook Iron Co.* (1) that the notice under s. 46, sub-s. 2, of the Bankruptcy Act, 1883, corresponding with s. 41, sub-s. 2, of the Act of 1914, need not be in writing. So too, notwithstanding the rule, the notice given by a debtor to any creditor that he has suspended payment of his debts which is made to constitute an act of bankruptcy need not be in writing: *Ex parte Nickoll.* (2) The rule which requires notices to be in writing only applies to notices which form part of the legal procedure in a bankruptcy. The decision in *Curtis* v. *Wainbrook Iron Co.* (1) was approved by A. L. Smith L.J. in *Lole* v. *Betteridge* (3), where Rigby L.J. said that r. 90 of the Rules of 1886, limiting the time when service of notices, orders or other proceedings was to be effected, was inapplicable to the case of a notice by which the sheriff was to be affected with knowledge of the presentation of a bankruptcy petition. It was decided in *Latter* v. *Juckes* (4) that if the sheriff has notice of a bankruptcy petition within the fourteen days, it did not matter whether a receiving order were made on that petition or on another petition of which he had not notice, until after the fourteen days, before he parts with the money to the official receiver. The receipt of the notice by Mr. McCrea, as registrar of the court, affected him with notice in his character of high bailiff. The first office is of a judicial character while the other is of an executive character. There may be judgment and execution issuing to give effect to it in the same court. By s. 1, sub-s. 5, of the County Courts Act, 1924: "Where after the commencement of this Act a vacancy occurs in the office of high bailiff of a court, no person shall be appointed to that office, and thereafter the registrar of that court shall by virtue of his office, be the high bailiff of the court."

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(1) Sect. 41, sub-s. 2: "Where, under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and, if within that time notice is served on him of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain it as against the execution creditor."

Tindale Davis in reply. A judgment creditor is not to be deprived of the fruits of his judgment unless he is deprived

(1) (1884) Cab. & E. 351.
(2) (1884) 13 Q. B. D. 469.
(3) [1898] 1 Q. B. 256, 259, 260.
(4) [1927] 1 K. B. 17.

by some statute: *Figg* v. *Moore Bros.* (1) The section must be construed strictly; there must be service of the notice, and it must be upon the high bailiff in his official character: *Bellyse* v. *M'Ginn.* (2) The question does not depend upon the existence of the knowledge of the high bailiff, but upon service of the notice upon him. By r. 13 of the Bankruptcy Rules, 1915: "All notices required by the Act or these Rules shall be in writing, unless these Rules otherwise provide, or the Court shall in any particular case otherwise order"; by s. 146 of the Act: "All notices and other documents for the service of which no special mode is directed must be sent by post to the last known address of the person to be served therewith"; and by r. 90: "Where notice of an order or other proceeding in Court may be served by post it shall be sent by registered letter." Although the offices of high bailiff and registrar were combined in the same person, the notice, in order to be effectual under s. 41, sub-s. 2, must reach him in his character of high bailiff, whereas upon the facts of this case it reached him in his character of registrar. By Order II., r. 34, of the County Court Rules, 1903–1929, it is provided that money received by the high bailiff under process must be paid to the registrar of the court of which he is the high bailiff; and that rule and r. 34 (*a*) favour my contention. The facts in *Curtis* v. *Wainbrook Iron Co.* (3) differed from the facts of the present case; further, decisions of a Court of Bankruptcy are not binding on the Divisional Court. In *Lole* v. *Betteridge* (4) the Court was dealing with r. 90 of the Bankruptcy Rules of 1886 relating to service of notices, etc., forming part of the legal procedure in a bankruptcy. A requirement by a statute that notice shall be served is not properly complied with by the receipt of notice at random. The Act of 1914 distinguishes between "serving" and "giving" notice: compare s. 40, sub-s. 1, and s. 45, proviso (ii.), with s. 41, sub-s. 2.

CLAUSON J. This is an appeal from a judgment of the learned county court judge at Plymouth. The circumstances

(1) [1894] 2 Q. B. 690,692.
(2) [1891] 2 Q. B. 227.
(3) Cab. & E. 351.
(4) [1898] 1 Q. B. 256, 259, 260.

which give rise to the matter with which we have to deal are as follows: The company, Shell-Mex, Ld., obtained on January 11 a judgment against Mr. Harris for some 77*l.* The judgment creditors proceeded to execution, and what ultimately happened was that the high bailiff, whose business it was to levy execution, was on February 25 paid out by being paid the sum of 78*l.* 8*s.* 1*d.*, which was the judgment, plus costs, and certain costs of levying. Under those circumstances it became the duty of the high bailiff, under s. 41, sub-s. 2, of the Bankruptcy Act, 1914, to retain the sum so paid to him less his costs of execution for fourteen days. Accordingly, he has to retain the whole of those moneys up to midnight on March 11. Then the Act provides that "If within that time"—in this case before midnight on March 11—"notice is served on him"—"him" in the Act was the sheriff, and it is admitted in this case the high bailiff is in the position of the sheriff—"of a bankruptcy petition having been presented by or against the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver." It happens that the high bailiff in this Court—Mr. McCrea—is also the registrar of the Court. Now on March 11 the debtor presented his own petition in this Court, and the receiving order was made on the same day, followed in the usual way by adjudication. On March 12 the official receiver gave a formal notice to Mr. McCrea of the bankruptcy petition having been presented and the receiving order having been made. If that was the only notice upon which the official receiver was entitled to rely, it was too late; it was after midnight of March 11. Mr. McCrea is not only high bailiff, but also the registrar of the county court. On March 11 the debtor presented his own petition to Mr. McCrea, and Mr. McCrea in fact himself made the receiving order. Under those circumstances the learned county court judge has held that on March 11 the registrar, who was also high bailiff, had full knowledge that the Bankruptcy Act had become operative. Under those circumstances the county court judge held that the money in question had to be paid to the official receiver. The execution creditors appeal, and the appeal can only succeed if it is possible for the appellants to establish that it is untrue to say that before midnight on March 11 notice was served on the high bailiff, Mr. McCrea, of the bankruptcy petition having been presented by the debtor.

Now the suggestion is this, as I understand it, that service involves some kind of formality which had not been carried out. I have asked in vain for a definition of exactly what the formality is, and I confess I do not appreciate it. The fact is that the high bailiff in fact knew within the time, and knew by reason of the communication made to him by the debtor and by reason of something which took place in the debtor's presence, and was in fact effected by the high sheriff himself in his capacity as registrar—namely, the acceptance of the petition and the making of a receiving order. It appears to me, under those circumstances, that it would be wrong to hold otherwise than as the county court judge has held, that the Bankruptcy Act became fully operative to the knowledge of the high bailiff. Accordingly, apart from authority, I should myself have been prepared to hold that the county court judge came to a correct decision.

But the matter does not rest there. In my view, it would not be right for us sitting in this Court to come to any other conclusion, for these reasons: first of all, because in *Curtis* v. *Wainbrook Iron Co.* (1) before Grove J., as long ago as 1884, that learned judge expressed a view from which there has been no dissent, that the notice which is here spoken of as the notice to be served need not be a notice in writing. Accordingly, verbal notice was enough. Further than that, in *Lole* v. *Betteridge* (2) the section was carefully considered by the Court of Appeal, consisting of A. L. Smith, Rigby and Collins L.JJ. They held that the requirements as to service in the then Bankruptcy Rules did not apply to this particular notice mentioned in the corresponding section of the Act of 1890—namely, s. 11—and Rigby L.J. used these expressions (3): "The counsel for the execution creditor drew

(1) Cab. & E. 351, 352.

(2) [1898] 1 Q. B. 256.

(3) [1898] 1 Q. B. 260.

our attention to the fact that s. 11 speaks of notice being 'served' on the sheriff of a bankruptcy petition; but, notwithstanding the use of that expression, I am clearly of opinion that the sheriff is bound under the section to hold the proceeds of the execution for the full period of fourteen days, and cannot justify handing them over to the execution creditor until that period has expired without his receiving notice of a bankruptcy petition." Now I understand Rigby L.J. in that sentence to mean that although the section speaks of something which is spoken of as "service" of a bankruptcy petition, yet, if the sheriff receives notice of a bankruptcy petition, the requirement of service on him of notice of the bankruptcy petition must be taken to have been complied with. I understand that to mean that there is no magic about "service"; the point is that knowledge of the existence of the petition must reach the mind of the sheriff. That is the view of Rigby L.J. It is, if I may respectfully say so, one from which I see no reason to differ. But it makes it impossible, in my view, for us to accede to the argument of Mr. Tindale Davis, that in this particular case the requirements of the section have not been complied with. I should add this. Some observations have been addressed to us as to the difficulties which arise from the fact of one gentleman holding both the office of high bailiff and the office of registrar. Speaking for myself, I can well appreciate that administrative difficulties may occur, the law being as it is, but with those administrative difficulties, in my view, we have not to deal. The only question we have to deal with is whether before midnight on March 11 such notice of the petition which was presented on the 11th, as was required came to the knowledge of Mr. McCrea, the high bailiff. In my view, it quite plainly did, and the county court judge was right in so finding, and, if my learned brother concurs with me, the result is that this appeal must be dismissed with costs.

LUXMOORE J. I concur.

Solicitors: *W. H. Court & Son, for Square, Geake & Windeatt, Plymouth; Solicitor to the Board of Trade.*

H. C. H.

WALTON HARVEY, LIMITED *v.* WALKER AND HOMFRAYS, LIMITED. (1)

BENNETT J.

1930

June 25, 26, 27; *July* 1, 31.

[1929. W. 2095.]

Contract—Impossibility of performance—Electrically illuminated advertisement—Erection and maintenance on building—Acquisition and demolition of building by local authority—Implied condition—Damages—Lands Clauses Acts—Manchester Corporation Act, 1920 (10 *&* 11 *Geo.* 5, *c. xcvii.*).

The lessees of a hotel entered into two contracts with a firm of advertising agents, under the terms of which the latter were entitled to erect and exhibit, for a term of years, upon the roof of the hotel, electrically illuminated advertisements. An electric sign was duly erected. Before the expiration of the term the local authority, in exercise of its statutory powers, served the lessees with a notice to treat for the purchase of their estate and interest in the hotel, and, ultimately, having acquired the reversion to the lessees' term, took possession, closed the hotel, and began to demolish it. The electric sign was removed by arrangement with the advertising agents, who subsequently commenced an action against the lessees to recover damages for breach of the two contracts:—

Held, that the local authority had acquired the defendants' interest in the premises by compulsion; that the two contracts did not confer upon the plaintiffs any proprietary interest or estate in the hotel; and that, as it could not be said that both parties to those contracts had made their bargain upon the footing that if the local authority exercised their powers and took the hotel the contracts were to be discharged, there must be a declaration that the defendants were liable to the plaintiffs for damages for breach of those contracts.

Baily v. *De Crespigny* (1869) L. R. 4 Q. B. 180 distinguished and explained.

THE following statement of facts is substantially taken from his Lordship's considered judgment:—

This action is brought to recover damages for an alleged breach by the defendants of two contracts made between the plaintiffs and the defendants. Both contracts are in writing and bear the common seals of the parties and are dated December 31, 1924.

No oral evidence was adduced at the trial, the facts upon which the questions for decision arise having been admitted on behalf of the parties.

The plaintiffs are advertising agents whose registered office is at Fleet Street in the City of London. The defendants are brewers trading in and in the neighbourhood of the City of Manchester. At the date of the two contracts the defendants were possessed of a hotel in Manchester known as the St. Peter's Hotel for the unexpired residue of a term of fourteen years from March 25, 1923, granted to them by an indenture of lease dated May 19, 1923. The lease in question was a renewal of an earlier lease, the defendants having in fact been in possession of the hotel as lessees since the year 1895.

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(1) Affirmed in C.A. November 25.

The two contracts in question were entered into for the purpose of enabling the plaintiffs to exhibit for a term of years upon the roof of the St. Peter's Hotel electrically illuminated advertisements. In these contracts the defendants are called "the owners," and the plaintiffs are called "the advertisers." The provisions of one of the agreements are as follows. The first one, relating to the placing of the sign upon the roof of the hotel, provides: "The owners will let and the advertisers will take the exclusive right of fixing and exhibiting on the front portion of the owners' premises known as St. Peter's Hotel Manchester an electric sign or signs as shown outlined in red on the plan annexed hereto for the period and upon the terms and conditions herein mentioned. 2. This agreement shall be and remain in force for a period of seven years from the 29th day of September 1924 with an option on the part of the advertisers to renew this agreement for a further period of five years upon the same terms and conditions. 3. The advertisers shall pay to the owners the annual sum of 75*l.* for the privileges aforesaid during the continuance of this agreement by four equal quarterly payments the first quarterly payment to be made on the 25th day of December 1924. 4. The advertisers shall be at liberty forthwith after the signing of this agreement to enter upon the said premises for the purpose of fixing and erecting wiring illuminating and showing the said electric sign. 5. The advertisers shall pay all sums which may become due to the Electric Supply Department of the Corporation of Salford for electric energy supplied for the purpose of the said electric sign and shall keep the owners indemnified against all claims in respect of the same.

6. On the determination of this agreement the said sign and all wire connection to the said premises shall be removed by the advertisers at their own expense they making good all damage done to the said premises in consequence of such erection and removal. 7. The advertisers shall pay all (if any) additional rates or taxes which may be charged upon the said premises by reason of the said electric sign (Property Tax only excepted) and shall indemnify the owners therefrom. 8. The advertisers shall pay any additional fire insurance or other insurance premiums which may become payable in consequence of the said electric sign as and when the same shall become due. 9. The owners shall not during the currency of this agreement enter into any agreement with any other person firm or company for the erection of any other electric sign on their premises."

No plan was in fact annexed to this agreement, but there is pasted or otherwise affixed to one of the pages of the document a photograph of the hotel, and on that photograph red ink lines are drawn for the purpose of indicating in a general way a space above the roof of the hotel which it was proposed to fill by the screen upon which the advertisements were intended to be shown.

The provisions of the other agreement are to the effect that the advertisers are to rent on the same terms as are provided by the agreement which I have just read a time switchboard or switchboards controlling the electric sign and provides that the plaintiffs are to have access to the premises for the purpose of operating the sign. The provisions of that agreement are substantially the same as the provisions of the agreement relating to the sign to be placed above the roof.

At the date of the two contracts there was in force an Act of Parliament called the Manchester Corporation Act, 1920, which enabled the Corporation of Manchester to acquire compulsorily certain lands, including the St. Peter's Hotel. The powers for compulsory purchase ceased after the expiration of five years from December 31, 1920. This Act incorporates the provisions of the Lands Clauses Acts.

On May 6, 1925, the Corporation of Manchester, purporting to exercise certain powers conferred upon them by s. 18 of the Manchester Corporation Act, 1891, granted to the plaintiffs a licence authorizing them to erect or set up on the roof of the St. Peter's Hotel a sign for the term of two years from the date thereof, and afterwards until the expiration of three months after notice requiring its demolition and removal had been given by the Corporation.

In the month of October, 1925, the plaintiffs erected a sign upon the roof of the St. Peter's Hotel and began to use it for advertising purposes in pursuance of the provisions of the said contract.

On December 18, 1925, in exercise of the powers conferred upon them by the Manchester Corporation Act, 1920, and for the purpose of acquiring compulsorily the St. Peter's Hotel, the Manchester Corporation served the defendants with a notice to treat for the purchase of their estate and interest in the St. Peter's Hotel. No notice to treat was served upon the plaintiffs.

The statutory machinery for enabling the Corporation to acquire the defendants' interest in the hotel moved slowly, and although the defendants appointed valuers on April 12, 1926, it was not until January 13, 1928, that an arbitrator was appointed to assess the compensation to be paid by the Manchester Corporation to the defendants for the acquisition of their interests in the St. Peter's Hotel. Shortly after the arbitrator had been appointed the defendants and the Corporation agreed the sum which the Corporation were to pay to the defendants, and by an agreement in writing dated April 19, 1928, the defendants agreed to sell to the Corporation the St. Peter's Hotel for the unexpired residue of the term for which they held the same for the sum of 3850*l.* This sum was agreed after negotiations between the defendants' valuers and the agents of the Corporation, and at the trial it was admitted on behalf of the defendants that there was included in this amount a sum for the value of the right of the defendants to receive the annual sums payable under the two contracts of December 31, 1924, during the unexpired periods thereof.

On March 7, 1929, the Manchester Corporation caused the plaintiffs to be served with a notice requiring them at the expiration of three months from the date thereof to remove the sign they had erected on the St. Peter's Hotel.

On September 25, 1929, the Manchester Corporation, having acquired the reversion to the defendants' term, the defendants by deed surrendered the St. Peter's Hotel to the Corporation, who thereupon took possession thereof, closed the hotel and began to demolish it. In January, 1930, the plaintiffs' sign was removed by the Corporation by arrangement with the plaintiffs. The plaintiffs paid to the defendants the rent which accrued due under the two contracts down to December 25, 1929. No rent has been claimed or paid in respect of any period after that date.

The plaintiffs, being, in these circumstances, prevented from maintaining the sign for the period set out in the contracts, commenced an action against the defendants for damages for breach of the above contracts.

Grant K.C. and *Charles E. Harman* for the plaintiffs. The interest of the plaintiffs is not an interest in the land, but a licence entitling them to do something. The sale by the defendants to the Manchester Corporation was a voluntary sale: see *In re Uxbridge and Rickmansworth Ry. Co.* (1), which shows that the mere service of a notice to treat does not constitute an exercise of compulsory powers. The defendants were willing vendors and are, therefore, liable to the plaintiffs, who are suing them for breach of an implied covenant on their part that they would not do anything to derogate from their own contract: *King* v. *David Allen & Sons, Billposting, Ld.* (2) The defendants have broken the implied obligation not to put it out of their power to fulfil their contract.

Secondly, if the defendants say that they can rely on the Corporation's powers, the position is this—namely, that, when the contract was made it was made for seven years and five years, and the defendants, therefore, bound themselves to give to the plaintiffs their rights for that period. The Manchester Corporation Act of 1920 was in existence at that

(1) (1890) 43 Ch. D. 536, 545, 561.

(2) [1916] 2 A. C. 54.

date. If a man purports to give an absolute right under circumstances in which he knows it cannot safely be given, he is liable in damages.

Thirdly, assuming that an absolute right was not granted but only a right subject to an implied condition, if the defendants obtained compensation, they ought to have safeguarded the rights of the plaintiffs also, so that they should obtain their compensation.

[They also referred to *Paradine* v. *Jane* (1); *Wilson* v. *Tavener* (2); *Frank Warr & Co., Ld.* v. *London County Council* (3); *Baily* v. *De Crespigny* (4); *Matthey* v. *Curling* (5); and *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban District Council.* (6)]

Archer K.C. and *P. B. Morle* for the defendants. There is no covenant in the deed, express or implied, against disturbance by a third party acting rightly under statutory powers. On the contrary the true implication is that there was an implied condition that, if, by reason of the exercise of the statutory powers, it became impossible for the defendants to perform their obligation to allow the plaintiffs to exhibit their advertisements, the plaintiffs should have only such rights as the Act creating the statutory powers might confer upon them. Consequently (1.) any proprietary right of the plaintiffs would be converted into their statutory right of compensation, and (2.) any non-proprietary obligation of the defendants, which could not be performed consistently with giving effect to the exercise of the statutory powers, would be discharged for impossibility of performance.

There was in fact an exercise of the paramount statutory powers in question which made it impossible for the defendants to allow the sign to be used.

[They referred to Anson on the Law of Contracts, 17th ed., ch. 15, p. 368; and *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (7)]

(1) (1647) Aleyn, 26.
(2) [1901] 1 Ch. 578.
(3) [1904] 1 K. B. 713.
(4) (1869) L. R. 4 Q. B. 180.
(5) [1922] 2 A. C. 180, 233.
(6) [1916] 2 K. B. 428.
(7) [1916] 2 A. C. 397, 422.

Baily v. *De Crespigny* (1) is conclusive against the plaintiffs' case. The true ground for that decision was that the state of circumstances, contemplated by the parties as continuing, did not continue and the covenant was, therefore, discharged.

The present case comes under the general principle of discharge for impossibility of performance.

[They referred to *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (2); *First Russian Insurance Co.* v. *London and Lancashire Insurance Co.* (3); *Manchester Corporation* v. *New Moss Colliery, Ld.* (4); *Hurst* v. *Picture Theatres, Ld.* (5); *Frank Warr & Co., Ld.* v. *London County Council* (6); *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (7); *James Jones & Sons, Ld.* v. *Tankerville (Earl).* (8)]

Another implied term of the contract was that the obligations of the defendants under their contract came to an end when the property was acquired by the Corporation: *Metropolitan Water Board* v. *Dick Kerr & Co., Ld.* (9); *Blackburn Bobbin Co.* v. *T. W. Allen & Sons.* (10)

Grant K.C. in reply. This is not an interest in land.

[BENNETT J. I am satisfied that you have no interest in land for which you could get compensation under the Lands Clauses Act.]

The only term which can be implied in a contract of this kind is a term which puts an end to the contract for all purposes. There is not merely an implied term that the plaintiffs shall be supplied with a hotel, but that fact is the essence of the contract: *Redmond* v. *Dainton.* (11) The Court is asked to read nothing into the contract. The defendants gave to the plaintiffs, for a consideration, a right to maintain a sign on a hotel. That right has gone and the defendants are liable for breach of contract. In all the cases the incapacity is a supervening incapacity; it is not an incapacity

(1) L. R. 4 Q. B. 180.
(2) [1915] 3 K. B. 676.
(3) [1928] Ch. 922.
(4) [1906] 1 Ch. 278, 289.
(5) [1915] 1 K. B. 1.
(6) [1904] 1 K. B. 713.
(7) [1902] 2 K. B. 574.
(8) [1909] 2 Ch. 440.
(9) [1918] A. C. 119.
(10) [1918] 1 K. B. 540, 543.
(11) [1920] 2 K. B. 256.

existing at the beginning of the contract. The defendants must be deemed in law to have known of the Act of 1920. The contract is either alive or dead. It cannot be kept on foot for the benefit of one party and destroyed so far as the other side is concerned: *Dominion Coal Co.* v. *Maskinonge Steamship Co.* (1) This is a breach of an express covenant to let something to the plaintiffs. If there is an implied covenant then it is a covenant that that about which the express covenant was made must continue to exist.

Cur. adv. vult.

July 31. BENNETT J. [after stating the facts as above set out, continued:] At the trial it was admitted on behalf of the defendants that they had not performed the obligations they had undertaken by the two contracts. Their answer to the plaintiffs' claim was that there should be implied into each contract a condition that if, by reason of the exercise of a statutory power, it became impossible for them to allow the plaintiffs to exhibit their sign and to place upon the St. Peter's Hotel and use a switchboard and control gear for the stipulated periods, the plaintiffs were to have only such rights as the Act conferring the statutory power might confer upon them. It was argued on behalf of the defendants that the consequence of implying this condition into each of the contracts was that, when the Manchester Corporation exercised their compulsory powers, any estate or right of property in the St. Peter's Hotel which the said contracts conferred upon or vested in the plaintiffs was converted into a right to compensation payable by the Manchester Corporation under the provisions of the Lands Clauses Acts, and that the contracts did confer upon the plaintiffs a proprietary interest in the St. Peter's Hotel, which interest had been acquired by the Manchester Corporation and was and is the subject of compensation by that Corporation under the provisions of the Lands Clauses Acts.

It was also argued that, if and so far as the contracts did not confer upon the plaintiffs any proprietary interest or estate in the hotel but merely created personal obligations binding the defendants to the plaintiffs, then the defendants were discharged from those contractual obligations by virtue of an implied condition that upon the exercise by the Manchester Corporation of the statutory power of acquiring the St. Peter's Hotel by compulsion the contracts were to come to an end.

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(1) [1922] 2 K. B. 132, 137.

The plaintiffs' reply to these arguments was, first, that the defendants did not in fact part with their interest in the St. Peter's Hotel under compulsion. It was contended on their behalf that although the Manchester Corporation possessed powers by which they could have purchased the defendants' interests in the hotel compulsorily, and although the Corporation took some steps for the purpose of compelling the defendants to sell, yet, in fact, in the end the defendants sold voluntarily. Secondly, it was argued on behalf of the plaintiffs that the contracts conferred no proprietary interest or estate in the hotel upon the plaintiffs, and that the plaintiffs' rights were merely personal rights arising out of a contractual relationship; and, lastly, it was argued on behalf of the plaintiffs, upon the footing that the rights of the parties were rights of contract only, that no such conditions as the defendants sought to imply into the contracts ought to be implied, and that accordingly there was in law no answer to their claim.

Upon these contentions I decide, first, that the Manchester Corporation did acquire the defendants' interests in the St. Peter's Hotel by compulsion. The judgment of Farwell J. in *Manchester Corporation* v. *New Moss Colliery, Ld.* (1), seems to me to settle this point in favour of the defendants.

Secondly, in my judgment, the two contracts did not, nor did either, confer upon the plaintiffs any proprietary interest or estate in the St. Peter's Hotel. They created a mere personal obligation on the part of the defendants to allow the plaintiffs to use the roof of the hotel for the purpose of fixing thereto and exhibiting an electric sign, and to place a switchboard and controlling gear in the hotel for operating

(1) [1906] 1 Ch. 278.

the said sign. The point is, in my judgment, concluded in favour of the plaintiffs by the decision of the House of Lords in *King* v. *David Allen & Sons, Billposting, Ld.* (1)

Thirdly, in my judgment, the two contracts did not, nor did either of them, confer upon or vest in the plaintiffs any estate or interest in the St. Peter's Hotel for which they are entitled to compensation from the Manchester Corporation under the Lands Clauses Acts. The decision of the Court of Appeal in *Frank Warr & Co., Ld.* v. *London County Council* (2) is, in my judgment, a conclusive answer to this part of the defendants' argument.

There remains the question whether the defendants, not having performed their contractual obligation, are liable for damages for breach of contract. The plaintiffs contend that the case is governed by the decision of *Paradine* v. *Jane.* (3) Their argument is that the defendants, having created a duty upon themselves, are bound to make it good notwithstanding any accident by inevitable necessity, because they might have provided against it by their contract. And so I think Lord Ellenborough would have decided it: see *Atkinson* v. *Ritchie.* (4)

As I have already said, the defendants' answer is that there must be implied into the contracts a condition for their discharge upon the happening of the particular event which made their performance impossible—namely, the acquisition under compulsory powers of the St. Peter's Hotel. The principles upon which a contract is dissolved in a case where an event which happens after its formation makes its performance impossible are, I think, now settled by the highest authority. The mere fact of impossibility arising after formation does not bring about a dissolution of a contract. It is dissolved because the parties to it have agreed that upon the happening of the particular event it shall be dissolved. The condition that it shall be dissolved upon the happening of the particular event is not expressed, but is implied from the terms of the particular contract and

(1) [1916] 2 A. C. 54.
(2) [1904] 1 K. B. 713.
(3) Aleyn, 26.
(4) (1809) 10 East, 530.

the circumstances in which it was made. These terms and circumstances must lead to the conclusion that the parties, when making their bargain, must have made it upon the footing that upon the happening of the particular event making performance or further performance of the expressed obligations impossible the contract was to be dissolved. Lord Loreburn states the principle in *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Co., Ld.* (1), in these terms: "When a lawful contract has been made and there is no default, a Court of law has no power to discharge either party from the performance of it unless either the rights of some one else or some Act of Parliament give the necessary jurisdiction. But a Court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract. In applying this rule it is manifest that such a term can rarely be implied except where the discontinuance is such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs, and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree. In the recent case of *Horlock* v. *Beal* (2) this House considered the law upon this subject, and previous decisions were fully reviewed, especially in the opinion delivered by Lord Atkinson. An examination of those decisions confirms me in the view that, when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the

(1) [1916] 2 A. C. 397, 403.

(2) [1916] 1 A. C. 486.

parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted."

And in the same case Lord Parker of Waddington states the principle as follows (1): "In considering the question arising on this appeal, it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending on some term or condition to be implied in the contract itself and not on something entirely dehors the contract which brings the contract to an end. It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency." Then he goes on to deal with a number of instances showing the circumstances in which conditions ought or ought not to be implied.

These being the principles to be followed in determining whether a condition for dissolution is to be implied, the defendants rely, in the first place, upon the decision of the Court of Queen's Bench in *Baily* v. *De Crespigny* (2) as a decision in which the principles were applied in a case where, after the formation of the contract, impossibility was brought about by the acquisition, by the exercise of compulsory powers, of a piece of land with respect to which covenants restrictive of its user had been made, and contend that it is a decision which governs the present case. The discussion, in the course of the argument, of the report of *Baily* v. *De Crespigny* (1) has satisfied me that it is no authority for the proposition for which the defendants seek to use it. That case was one in which the defendant, in the year 1840, had demised to the plaintiff certain hereditaments at Camberwell for a term of years and, amongst other things, covenanted with the plaintiff that neither he, the defendant, nor his heirs nor assigns should or would during the term permit to be built on the paddock fronting the premises demised any messuage or dwelling-house, coach-house or stable, or other erection save and except summer-houses or pleasure houses in private garden ground and also a church or chapel at the eastern extremity of the paddock. After the date of the demise the paddock was acquired from the defendant by the London, Brighton and South Coast Railway Company under compulsory powers contained in a private Act of Parliament of 1862, and the railway company erected upon the paddock a railway station, urinals and a water-closet. The plaintiff sued the defendant for damages for breach of the covenant, one of the breaches assigned being that the railway company, as the defendant's assigns, had built the railway station, urinals and water-closet upon the paddock in question.

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(1) [1916] 2 A. C. 422.

(2) L. R. 4 Q. B. 180.

As I read the report the reason why judgment was entered, as it was, for the defendant was that, upon the true construction of the contract the defendant had made, the railway company were not the defendant's assigns and, therefore, the defendant had not committed any breach of the contract he had made. The plaintiff failed, not because the contract he had made with the defendant was discharged by virtue of an implied condition for its discharge, but because, as a matter of construction, the railway company were held not to be the assigns of the defendant. The head-note of the report in the Law Reports is, I think, a little misleading in stating that the defendant was discharged from

(1) L. R. 4 Q. B. 180.

his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim "Lex non cogit ad impossibilia." The real grounds of the decision are, I think, stated on p. 185 of that report where Sir James Hannen, who delivered the judgment of the Court, is reported as follows: "We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract." Then, after citing Maule J. in two cases, the learned judge goes on: "To apply the foregoing observations to the present case: The defendant has covenanted that his 'assigns' shall not build. The word 'assigns' is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law. The defendant when he contracted used the general word 'assigns,' knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted.

The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties. On the other hand, to confine the word ' assigns ' to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee : because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification."

The Court in the passages to which I have referred seems to have adopted the arguments of the defendant, and those arguments appear from the report to be addressed almost exclusively to the question whether, upon the true construction of the contract in that case, the railway company were assigns of the defendant.

If I am right as to the ground upon which the decision in *Baily* v. *De Crespigny* (1) was based, it has no bearing upon the present case, and only decided that a railway company, who bought a piece of land in exercise of a compulsory power, was not the assign of a person who had covenanted that his assigns would not use that piece of land otherwise than for certain specified purposes. The opinion I entertain as to the grounds of the decision in *Baily* v. *De Crespigny* (1) appears to be in accordance with the view of that case taken by Lord Buckmaster and expressed by him in *Matthey* v. *Curling*. (2)

If *Baily* v. *De Crespigny* (1) does not govern this case the question has to be considered upon principle, and the terms

(1) L. R. 4 Q. B. 180.

(2) [1922] 2 A. C. 180, 227.

of the contracts and the circumstances in which they were made have to be examined in order to see whether they lead to the conclusion that the parties must have made their bargain upon the footing that it was to come to an end if the particular event which has made performance impossible happened.

First, as regards the terms of the contract. These provide for the payment by the plaintiffs of annual rents payable quarterly amounting to 100*l.* and becoming payable from September 29, 1924, that is, three months before the contracts were made. With such a provision can it be said that the parties must have made their bargain upon the footing that if, as might have happened, the Manchester Corporation took the hotel under their compulsory powers before the sign was up and in working order, and at a time when the plaintiffs could not possibly have got any return for their outlay, it was to be at an end without any right on the part of the plaintiffs to get back any of their outlay? I cannot think so. I can easily imagine that if the possibility of the compulsory purchase by the Manchester Corporation under existing powers had been discussed between the parties before they expressed their bargain in writing, some provisions as to what the rights of the parties should in that event be would have been inserted in the contracts; but I find it impossible to imagine that they would have been provisions which would have enabled the defendants to retain rents paid by the plaintiffs before they had had the opportunity of getting any return for their money. Such an arrangement does not seem to me to be one which commercial men would have been likely to make.

Secondly, as to the circumstances in which the contracts were made. The Manchester Corporation Act, 1920, received the Royal Assent on August 4, 1920. Sect. 17 of that Act provides that the powers of the Corporation for the compulsory purchase of lands are to cease after the expiration of five years from December 31, 1920, that is, on January 1, 1926. On December 31, 1924, therefore, rather more than four-fifths of the period during which the powers might be exercised had run out. The Standing Orders of Parliament require that, before a Bill for the compulsory taking of lands and houses is applied for, notice in writing must be served upon the owners, lessees and occupiers of all such lands and houses. The defendants must have had notice of the application to Parliament for a Bill to enable the Manchester Corporation to acquire the St. Peter's Hotel by compulsion, and I cannot bring myself to believe that they were always in complete ignorance of the provisions of the Act of 1920. It seems to me to be within the bounds of possibility that the defendants, being in a position in which they could get a contract for the payment of annual rents amounting to 100*l.* a year for a term of seven years, might have regarded the risk of powers which had been unexercised for four years being exercised in the last year of their life as negligible. There is a great difference, as it seems to me, between the circumstances of such a case as the present and a case where a power to acquire by compulsion comes into being after the date of the contract. Suppose such contracts as those in question in this action had been made with respect to an hotel in Scarborough in December, 1913, it would I think have been easy to imply a condition for their discharge upon the destruction of the hotel by hostile bombardment in December, 1914. But suppose similar contracts to have been made in January, 1915, after the hostile bombardment in December, 1914, and suppose the subsequent destruction of the hotel by another hostile bombardment shortly afterwards, the circumstances in which such a contract was made would, I think, be such as to make it extremely difficult to imply a condition for their discharge.

Looking, therefore, at the terms of the contracts and the circumstances in which they were made, I do not find it possible to say that both parties must have made their bargain upon the footing that if the Manchester Corporation exercised their powers and took the St. Peter's Hotel the contracts were to be discharged, and, therefore, it follows that no such condition as the defendants seek to imply ought, in my judgment, to be implied.

BENNETT J.
1930
Walton Harvey, Ld. v. Walker and Homfrays, Ld.

The result, therefore, is that, in my judgment, the defendants have broken the two contracts of December 31, 1924, and there must be a declaration that the defendants are liable to the plaintiffs for damages for breach of such contracts and an order for an inquiry in Chambers as to the amount of such damages.

The defendants must pay the costs of the action, and the costs of the inquiry will be reserved.

Solicitors: *Stanley B. Worth; Church, Adams, Tatham & Co., for Cobbett, Wheeler & Cobbett, Manchester.*

J. L. D.

CLAUSON J.
1930
March 6.

In re FORREST.

CARR *v.* FORREST.

[1930. F. 505.]

Will—Construction—Gift of Residue between several named Legatees—Revocation by Codicil of Gift to two of the residuary Legatees—Confirmation of Will as modified by Codicil—Intestacy.

By her will in 1920 the testatrix, who died in the same year, gave the residue of her real and personal estate to her executors upon trust to permit her husband to receive the rents and income thereof for his life, and directed that after his decease the trustees should sell and convert her residuary estate and should stand possessed of the net residue upon trust to pay and provide for thereout certain legacies.

Then there was a direction that the surplus moneys remaining after payment of the legacies should be divided between seven named persons, the children of A. H. M., the children of W. S., and the two children of J. S. in certain proportions. By a codicil the testatrix gave 1000*l.* upon trust to pay the income to E. S. for her life, and after her decease directed that the same should fall into her residuary estate and be divisible accordingly: she then revoked the gift by her will of the portion of her residuary estate to the two children of J. S., and directed that they should take no part of her residuary estate, and, in all other respects, she confirmed her will:—

Held, that in the absence of sufficient indication of intention to give the shares, the gift of which was so revoked, to the other residuary legatees, the effect of the revocation was that those shares were undisposed of.

The principle of *Sykes* v. *Sykes* (1868) L. R. 3 Ch. 301 applied.

Quaere whether the decision of *In re Whiting* [1913] 2 Ch. 1 is reconcilable with that principle.

ADJOURNED SUMMONS.

Dame Elizabeth Forrest made her will on August 11, 1920, and thereby after appointing executors and trustees thereof and directing payment of her debts and funeral and testamentary expenses and bequeathing certain annuities, devised and bequeathed all the residue of her real and personal estate unto her executors upon trust to permit her husband to receive the rents, income and profits thereof for his life, and after his decease directed the trustees of her will to sell and convert into money her real and personal estate and to stand possessed of the net residue upon trust to pay thereout, amongst other legacies, 1000*l.* to each of her nieces, Mary Maude and Sarah Ann Brierley, 1000*l.* to Caroline Maude the widow of her deceased nephew William Maude, 1000*l.* to her nephew, John William Maude, 1000*l.* to each of her nieces, Mary Jane Wood and Elizabeth Bussey, 1000*l.* to her nephew, Thomas Maude, and 500*l.* to each of the children of Joseph Shaw. The testatrix then gave to Arthur Maude the interest on 1000*l.* for his life and after his decease directed the trustees to pay such interest to his wife so long as she should remain unmarried, and after her marriage or decease the testatrix gave the 1000*l.* to the children of Arthur Maude in equal shares. The testatrix further gave the interest of 1000*l.* to William Shaw for his life, and after his death directed the trustees to pay and divide the 1000*l.* amongst the children of William Shaw then living in equal shares. Besides the trusts of those settled legacies, there were trusts to invest certain sums and to pay the income thereof respectively to two nieces and a nephew named in the will during their respective lives, with a direction that after the death of each the sum so invested for her or his benefit should fall into and form part of the residuary estate of the testatrix and be divisible as thereinafter mentioned. The testatrix then directed that any surplus moneys remaining after payment of the legacies should be divided amongst Mary Maude, Sarah Ann Brierley, Caroline Maude, John William Maude, Mary Jane Wood, Elizabeth Bussey, Thomas Maude, the children of Arthur Hardy Maude, the children of William Shaw and the two children of Joseph Shaw in the same proportions as the amount of the legacies she had left them.

The testatrix made a codicil to her will dated December 11, 1920, whereby she gave to her trustees 1000*l.* upon trust to invest the same and to pay the income to Elizabeth Smith for her life, and after her decease directed that that sum should fall into and form part of her residuary estate and be divisible accordingly. Then there came the following words: "Whereas by my said will I have given a portion of my residuary real and personal estate to the two children of Joseph Shaw Now I hereby revoke such gift and I direct that they shall take no part of my residuary estate And in all other respects I confirm my said will."

The testatrix died on December 12, 1920, and her husband, Sir William Croft Forrest, died on April 12, 1928. The testatrix left both real and personal estate of considerable value.

Upon the hearing of the originating summons, which was taken out by one of the trustees of the will for the determination of various questions which arose upon the construction of the will of the testatrix, Clauson J. decided, amongst other matters, that the revocation by the codicil of the portion of the testatrix's real and personal estate mentioned in the codicil as having been given by the will to the two children of the testatrix's nephew, Joseph Shaw, operated so as to revoke only the shares in the ultimate residue given to them by the will, and did not operate so as to revoke the legacies of 500*l.* each directed by the will to be paid to them out of the testatrix's residuary estate. There then remained to be determined the question whether, in consequence of such revocation, the shares in the ultimate residue, so expressed to be given by the will to the two children of Joseph Shaw, ought to be treated as having fallen into the residue and become distributable accordingly or ought to be treated as remaining undisposed of by the testatrix.

Hugh Gamon for the plaintiff, one of the trustees of the will of the testatrix.

W. L. Blease for the defendant, Walter Forrest, the other trustee of the will and, with the plaintiff, executor of the will of Sir William Croft Forrest, the testatrix's husband. The shares of residue in question, the gift of which was revoked by the codicil, are undisposed of, and, to the extent that the shares consist of personal estate, the husband of the testatrix is entitled to them. The gift is not to a class, but to individuals nominatim, and no intention is shown by the will and codicil to give those shares over to the other named residuary legatees: *Sykes* v. *Sykes.* (1) *In re Wilkins* (2) is to be preferred to *In re Whiting.* (3)

A. H. Droop for the defendant, Frederick William Maude, the heir at law of the testatrix, adopted the last argument.

Jenkins K.C. and *R. H. Hodge* for the defendants, Arthur Hardy Maude and his wife and Mary Maude, Mrs. Sarah Ann Brierley and John William Maude. There is no intestacy in regard to these shares. The will shows an intention to dispose of the whole of the residuary estate. The legacy given by the codicil to Elizabeth Smith for life with a direction that on her death that legacy should fall into her residuary estate is sufficient indication of the testatrix's intention not to die intestate, but that the shares should form part of her residuary estate, as if the gift to the two children of Joseph Shaw had not been made by the will. The effect of the confirmation of the will by the codicil is that the will must be read as at the date of codicil: *In re Fraser.* (4) So reading the will, the gift of the residue amongst the legatees named in the will must be construed as a gift to those legatees who are entitled under the will and codicil, that is to say, to those named legatees other than the two children of Joseph Shaw, whose shares are taken away by the codicil. The joint effect of the will and codicil together is to add the shares given by the will to the two children of Joseph Shaw to the shares given to the other named residuary legatees: *In re Whiting* (3); *In re Palmer.* (5)

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(1) L. R. 3 Ch. 301, 302.

(2) [1920] 2 Ch. 63.

(3) [1913] 2 Ch. 1.

(4) [1904] 1 Ch. 726, 734.

(5) [1893] 3 Ch. 369.

Beebee for the children of Arthur Hardy Maude adopted the last argument.

Wilfrid Hunt and *J. Neville Gray* for other defendants not interested in this question.

CLAUSON J. Lord Cairns L.C. in *Sykes* v. *Sykes* (1) said : "I have a strong impression, and it is always unsatisfactory to have such an impression, that if the legal effect of the words which the testator was using had been pointed out to him, he would have made a different disposition by this codicil. With that, however, I have nothing to do, and I have only to put a proper construction upon the words which he has used, according to the authorities. The cases are clear, that if there is a devise or bequest of residue to a number of persons nominatim as tenants in common, and then a revocation of the devise or bequest of one of the shares, that thare does not fall into residue, but becomes undisposed of and goes to the next of kin or heir at law. That was decided, if a decision was necessary, by the case of *Cresswell* v. *Cheslyn* (2), and subsequent cases have occurred in which the same principle has been fully recognized." In the case of *Sykes* v. *Sykes* (1) it appears that the codicil which revoked the share of residue to which Lord Cairns referred contained words confirming the will. That appears from the statement in the argument of Mr. Rolt in the case of *In re Whiting* (3) before Joyce J. Accordingly, I understand Lord Cairns L.C. to have decided in *Sykes* v. *Sykes* (1), that if there is a gift to persons nominatim and a revocation by a codicil of the gift of one of the shares, then that share is undisposed of, notwithstanding that by the codicil which revokes the gift there may be a confirmation of the will.

In the case of *In re Whiting* (3), to which I have already referred, the point arose in these circumstances : there was a gift of residue not to a class, but to forty-six named persons.

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(1) L. R. 3 Ch. 301, 302.

(2) (1762) 2 Eden, 123 ; affirmed sub nom. *Cheslyn* v. *Cresswell* (1763) 3 Bro. P. C. 246.

(3) [1913] 2 Ch. 1, 3.

By a codicil there was a revocation of the gift of shares in the residue to two of the named legatees, and the testator by the codicil confirmed the will. Joyce J. saw his way to hold that the effect of the confirmation of the will by the codicil was as though the gift in the will to forty-six persons had been replaced by a gift to forty-four persons. The difficulty that arises in the way of that decision is to reconcile it with the principle upon which Lord Cairns decided the case of *Sykes* v. *Sykes.* (1)

The matter came before Sargant J. in the case of *In re Wilkins.* (2) There, as in *In re Whiting* (3), there was a gift of residue between persons nominatim in equal shares, with a revocation by codicil of a share and confirmation of the will subject to the revocation; and, notwithstanding the view taken by Joyce J. in *In re Whiting* (3), Sargant J., as he pointed out (4), would have decided in favour of an intestacy, but for the presence of a particular clause in the codicil, which enabled him to come to the conclusion that the revoked shares of residue had in fact been put back into residue. He expressed the view that *In re Whiting* (3) was not reconcilable with the previous decisions and in conflict with *Sykes* v. *Sykes* (1), and he referred, in support of that view, to the language used by Lindley L.J. in *In re Palmer* (5), which I do not pause to read again. In that state of the authorities I think I shall be causing confusion if I were to depart from the line taken by Lord Cairns in the case of *Sykes* v. *Sykes.* (1) In that case the Lord Chancellor, as he pointed out, had an uncomfortable impression that, if the point had been before the mind of the testator, the codicil would have been differently framed, and in *In re Whiting* (3) Joyce J., no doubt feeling that if the rule in *Sykes* v. *Sykes* (1) were applied, he might be doing violence to what would really have been the intention of the testator had the point been drawn to his attention, felt himself able to depart from the rule in *Sykes* v. *Sykes.* (1) I for myself do not feel that

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(1) L. R. 3 Ch. 301.
(2) [1920] 2 Ch. 63.
(3) [1913] 2 Ch. 1, 3.
(4) [1920] 2 Ch. 68.
(5) [1893] 3 Ch. 369.

I am justified in departing from the rule and, accordingly, I can only decide here that the shares of residue revoked by the codicil pass into the rest of the residue and are disposed of by the will, if I can find some particular expressions in the will which lead to that result. Mr. Jenkins has suggested that I can find such expressions in the terms of the gift to Elizabeth Smith, read of course with the rest of the codicil. The gift to Elizabeth Smith is in these terms: "I give to my trustees the sum of 1000*l.* upon trust to invest the same in or upon some one or more of the securities trustees are by law empowered to invest trust moneys and to pay the income to arise therefrom to Elizabeth Smith the daughter of my brother John Maude for her life and after her decease I direct that the said sum of 1000*l.* shall fall into and form part of my residuary estate and be divisible accordingly." Then it goes on: "And whereas by my said will I have given a portion of my residuary real and personal estate to the two children of Joseph Shaw Now I hereby revoke such gift and I direct that they shall take no part of my residuary estate and in all other respects I confirm my said will." The argument is that it is absurd to suppose that in respect of that 1000*l.* which is to fall into the residuary estate the testatrix contemplated or appreciated that as regards a portion of it there would be an intestacy. That argument is used to suggest that I must, reading the will and the codicil together, simply treat the expression "children of Joseph Shaw" in the will as struck out, leaving the residuary gift to operate as if they had never been among the number of the persons named in the will to whom the residue is given. I do not feel able to do that. It appears to me that I have here a plain direction that certain shares of the residuary estate are not to go to the persons to whom they are given by the will. If that is all I have, it seems plain that on authorities which bind me in this Court I must hold that as to those shares there is an intestacy. The trustees will be at liberty to treat those shares as belonging as to one-fourth (as representing real estate) to the defendant Frederick William Maude as the heir at law of the testatrix and as to the remaining three-fourths (as representing personal estate) to the legal personal representatives of the testatrix's husband.

CLAUSON J.
1930
FORREST, *In re.*
CARR *v.* FORREST.

Solicitors: *Few & Co., for Carr, Sandelson & Co., Leeds; Peacock & Goddard, for Waterworth & Laycock, Keighley; Haslewood, Hare & Co.; Arthur Samuel Fisher.*

H. C. H.

THE NORTH CHARTERLAND EXPLORATION COMPANY (1910) LIMITED *v.* THE KING.

LUXMOORE J.
1930
May 15, 16, 21; *June* 26.

Crown—Petition of Right—Protectorate—Grant of Lands by Company with Rights under Charter—Rights of Grantees—Native Reserves—Grants of Land by Crown—Prerogative of Crown—Orders in Council affecting Lands granted—Legislative or Executive Powers of Crown—Derogation from Grant—Compensation to Grantees—Effect of Act of Parliament on Crown's Prerogative—Foreign Jurisdiction Act, 1890 (53 *&* 54 *Vict. c.* 37), *ss.* 1, 2, 3, 11 *and* 12.

The legislative authority over the territory of a Crown Protectorate belongs to the Crown and is controllable only by the Imperial Parliament.

Under the Foreign Jurisdiction Act, 1890, the prerogative power of legislation in respect of Protectorates is exercised by Orders in Council, and these Orders have statutory effect.

A grant of land in a Protectorate by the Crown is an executive and not a legislative act, and cannot by itself impose a fetter on the legislative power of the Crown. Where therefore by a subsequent Order in Council the Crown has exercised legislative powers in respect of the land previously granted, the legislative power so exercised is valid.

The doctrine of derogation from grant cannot be applied in the case of a grant by the Crown so as to deprive it of its paramount right to legislate for the Protectorate in which the subject of the grant is situate.

The Crown cannot renounce or fetter its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which the legislative authority exists.

Campbell v. *Hall* (1774) 1 Cowp. 204 discussed and distinguished.

PETITION OF RIGHT.

The following statement of facts is substantially taken from his Lordship's judgment:—

This is a demurrer on behalf of the Crown to a Petition of Right presented by the North Charterland Exploration Company (1910) Ld. (to which I shall refer as " the suppliant

LUXMOORE J.

1930

THE NORTH CHARTERLAND EXPLORATION COMPANY (1910) LD. v. THE KING.

Company.") The material facts as stated in the Petition of Right, which must for the purposes of the demurrer be accepted as accurate, are as follows: On May 8, 1895, the British South Africa Company (hereinafter called "the Chartered Company") agreed to grant to the Mozambique Gold Land & Concessions Company, Ld. (to which I shall refer as "the Mozambique Company"), the right to locate a block of land not exceeding 10,000 square miles in area defined in the agreement and being within the British sphere of influence and also within the territories comprised in the Chartered Company's charter. The grant was to be subject to the terms mentioned in the agreement, but I need not refer to these as the agreement was subsequently carried into effect by a deed of grant to which I shall refer later. It is sufficient at the moment to state that in pursuance of the agreement the Mozambique Company caused another company to be incorporated on May 17, 1895, under the name of the North Charterland Exploration Company, Ld. I shall refer to this company as "the Old Company."

The Mozambique Company in due course transferred the benefit of the agreement with the Chartered Company to the Old Company, and the Old Company thereupon entered into possession of the territory the subject of the agreement. I will refer to this territory as "The North Charterland Concession." On March 24, 1906, the Chartered Company issued to the Old Company a confirmation of the agreement, and on the same day the deed of confirmation or certificate was duly registered in the local Deeds Registry at Fort Jameson in North-Eastern Rhodesia. The deed of confirmation so far as material is in the following terms: "This is to certify that in consideration of the agreement made in a letter dated May 8, 1895, from the secretary of the Chartered Company to the Mozambique Company the Old Company is hereby granted by the Chartered Company a piece of land containing 10,000 square miles known as the North Charterland Concession and situated in the East Luangwa district of North-Eastern Rhodesia and bounded as follows:"—then a description follows which it is immaterial to consider. The deed continues: "This grant is made subject to the condition that the rights of natives shall be respected and subject also to the Chartered Company's regulations as to land applicable to the territory in question. Under the regulations the grant is made subject to the condition that the proprietor shall pay the cost of survey and the land is granted with the following rights and subject to the following conditions"—then follow a number of conditions. Condition (1.) provides that all roads and thoroughfares existing over the North Charterland Concession shall remain free and uninterrupted unless the same be closed or altered by competent authority. (2.) All minerals, etc., are reserved to the Chartered Company which is to have the right by itself or its assigns at all times to enter upon the North Charterland Concession or any portion of it for the purposes of inspection survey prospecting mining or any public purpose. (3.) The Chartered Company or any body corporate or person duly authorised by it shall at all times have the power without compensation of making roads telegraphs railways and railway stations over and of taking materials for making or repairing roads telegraphs and railways anywhere from any part of the North Charterland Concession which shall not have been improved by cultivation irrigation or otherwise, and shall further have the power of making roads telegraphs railways and railway stations over and of taking materials for making or repairing roads telegraphs or railways anywhere from any part of the North Charterland Concession which shall have been improved by cultivation irrigation or otherwise, and of making aqueducts dams and drains on payment to the proprietor (the Old Company) of such sum of money in compensation for surface disturbance as may be mutually agreed upon by the parties concerned or failing such agreement as may be settled by arbitration. (6.) The Chartered Company shall have the right of resuming possession of the North Charterland Concessions or any portion thereof for any public purposes on payment or tendering to the proprietor compensation for the interrupted use and occupation of land so resumed and any improvements upon it, and in default of agreement as to the amount of such compensation the same shall be determined by arbitration. There is, so far as I appreciate the questions to be determined nothing else in the deed of confirmation to which it is material to refer.

Subsequent to the execution and registration of the deed of confirmation the Old Company went into liquidation for the purposes of reconstruction and the suppliant Company was incorporated. On August 11, 1910, the Old Company and its liquidator entered into an agreement with the suppliant Company for the transfer to the latter of the North Charterland Concession with all the property and rights enjoyed therewith. This agreement has been carried into effect and the North Charterland Concession in due course became vested in the suppliant Company. The Chartered Company I am informed acted as managers of the suppliant Company at any rate so far as the North Charterland Concession is concerned.

From time to time after the agreement to grant the North Charterland Concession to the Old Company, Orders in Council were made purporting to affect the territory in which the North Charterland Concession is situated. I will refer only to those Orders which are material. The first is an Order in Council of Her Late Majesty Queen Victoria dated January 29, 1900. This Order (the North-Eastern Rhodesia Order in Council, 1900) contains recitals to the effect that (*a*) the territories of Africa situated in the limits of the Order, as thereinafter described (which include the North Charterland Concession), are under the protection of Her Majesty Queen Victoria; (*b*) that by Treaty, grant, usage, sufferance and other lawful means, Her Majesty has power and jurisdiction in the said territories; and it states that Her Majesty therefore by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested is pleased by and with the advice of Her Privy Council to order, and it is hereby ordered as follows: Clause 1 states that this Order may be cited as the North-Eastern Rhodesia Order in Council, 1900. Clause 2 provides that the Order is divided into Parts. So far as material Part II. relates to

Administration and Legislation, and includes Clause 7 which provides that the Chartered Company shall have and may exercise the general administration of affairs within the limits of the Order in accordance with the terms of the Chartered Company's Charter and the provisions of the Order, and Clause 8 which provides that the Chartered Company may exercise such administration by an officer styled the Administrator. His appointment and salary are to be approved by one of Her Majesty's Principal Secretaries of State, and the Administrator may be removed or suspended from office by the Secretary of State or by the Chartered Company with his approval. Part V. of this Order relates to Native Administration and by Clause 40 it is provided that the Chartered Company shall from time to time assign to the natives inhabiting North-Eastern Rhodesia land sufficient for their occupation whether as tribes or portions of tribes and suitable for their agricultural and pastoral requirements. Under this Order the Chartered Company appears to have set aside from time to time out of the North Charterland Concession reserves for natives but without making any compensation to the Old Company or to the suppliant Company. No question arises, so far as this petition is concerned, with regard to this setting aside by the Chartered Company.

On September 29, 1923, His Majesty's Secretary of State for the Colonies entered into an agreement with the Chartered Company for the settlement of a number of questions which were then outstanding in relation to the administration of Southern and Northern Rhodesia. At this time Northern Rhodesia included North-Eastern Rhodesia and consequently the North Charterland Concession. So far as this case is concerned the material parts of this agreement are clauses 3 (*a*), (*e*) and (*f*). The suppliant Company was not a party to it. Clause 3 (*a*) provides that the Crown shall as from April 1, 1924, relieve the Chartered Company of the administration of Northern Rhodesia as then exercised, Northern Rhodesia including the North Charterland Concession. Clause 3 (*e*) provides that as regards the North Charterland Concession the Crown reserves the right to set apart such native reserves in the area granted to the Old Company (that is, the North Charterland Concession) as the Crown may deem proper, and clause 3 (*f*) provides that the Crown shall recognize all alienations of land which have been made by the Chartered Company in North Rhodesia (including North-Western Rhodesia, as therein defined) on condition that any moneys due or accruing on or after March 31, 1924, in respect of such alienations are paid to the Crown, subject as regards lands in North-Western Rhodesia to certain special arrangements therein specified.

To give effect to this agreement, a further Order in Council was made on March 22, 1928. This Order recites among other things the agreement of September 29, 1923, to which I have just referred. The recital of this agreement is as follows: " Whereas by an Agreement bearing date the 29th day of September, 1923, made between His Majesty's Principal Secretary of State for the Colonies on behalf of His Majesty (in the said Agreement referred to as 'the Crown' of the one part and the British South Africa Company (therein and hereinafter referred to as 'the Company') of the other part it was amongst other things provided that the Crown should as from the 1st day of April, 1924, relieve the Company of the administration of Northern Rhodesia and that:—(*a*) The Company as from the 1st day of April, 1924, assigned and transferred to the Crown all such rights and interests in lands as it claimed to have acquired by virtue of the concessions granted by Lewanika, upon which date the full and entire control of the lands throughout North-Western Rhodesia as well as elsewhere in Northern Rhodesia should be taken over by the Crown and thereupon (subject to certain provisions with regard to the rights of the Company to lands and minerals contained in the said Agreement) the Crown should be completely free to administer such lands in such manner as the Crown might in its discretion deem best in the interest of the native population and in the public interests generally: (*b*) The Crown should recognise all alienations of land which had been made by the Company in Northern Rhodesia before the 1st day of April, 1924. (*c*) As regard the Concession granted by the Company to the North Charterland Exploration Company" —that is the Old Company—" the Crown reserved the right to set apart such Native Reserves in the area granted to that Company, such area being wholly within the limits of Northern Rhodesia, as the Crown might deem proper: And whereas in accordance with the said Agreement the Crown did as from the 1st day of April, 1924, relieve the Company of the administration of Northern Rhodesia and by an Order of His Majesty in Council bearing date the 20th day of February, 1924, and entitled the Northern Rhodesia Order in Council, 1924, provision was made for the administration of Northern Rhodesia by a Governor to be appointed by His Majesty. And whereas the Governor appointed Commissioners on the 10th day of October, 1924, to make inquiry as to what land should be reserved for natives within the area granted by the said Concession to the North Charterland Exploration Company and received a report accordingly from the said Commissioners. And whereas by reason of the premises it is desirable to declare what land within Northern Rhodesia shall be Crown Land and Native Reserves respectively and to confirm certain alienations of land within Northern Rhodesia." Then follow the enacting provisions. "Now, therefore, His Majesty, by virtue and in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows": then it says that the Order is to be cited as the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928, and that it is to be read and construed as one with the Northern Rhodesia Order in Council, 1924. Then in Clause 2 you get definitions, which include a definition of the expression "Native Reserves," which expression is defined as meaning "The lands set apart by this Order for the sole and exclusive use of the natives of Northern Rhodesia and any lands which may hereafter be constituted Native Reserves by any Order in Council amending or adding to this Order." Then Clause 3 (2.)

provides that "All alienations of land made by the Company prior to the 1st day of April, 1924,"—that is the Chartered Company—"and duly registered according to law are hereby recognised and confirmed." Clause 6 provides that "The lands described in the Schedule hereto and known as Native Reserves, as also the appendant rights set forth in the said Schedule, are hereby vested in the Secretary of State and set apart in perpetuity for the sole and exclusive use and occupation of the natives of Northern Rhodesia subject to the terms of Article 43 (as hereinafter amended) of the Northern Rhodesia Order in Council, 1924, and subject also to the following provisions:— . . . ." These provisions are there set out and are immaterial to be referred to so far as this case is concerned. I think the only other Clause to which reference need be made is Clause 11, which provides that "His Majesty, his Heirs and Successors in Council may from time to time revoke, add to, alter or amend this Order." The Schedule contains particulars of the Native Reserves set apart under the Order and vested by Clause 6 of the Order in His Majesty's Secretary of State for the Colonies. The Reserves are nine in number and each of them consists of land comprised in the North Charterland Concession.

The suppliant Company, which was of course entitled to the North Charterland Concession at the date of the 1928 Order in Council, has not received any compensation in respect of any part of the land comprised in all or any of these nine Native Reserves. This Petition has been presented to establish the right of the suppliant Company, first to the whole of the land set aside by the 1928 Order in Council as Native Reserves, and secondly (and this relief is claimed in the alternative) in the event of the Court holding that the first claim cannot be substantiated, to compensation in respect of the setting aside of the nine Native Reserves in question out of the North Charterland Concession.

The claims of the suppliant Company are made clear by the prayer to the Petition of Right, which is set out in paragraph 13 of the Petition. "The suppliant Company humbly submit that it is entitled to a Declaration:—(*a*) That the said North

Charterland Concession is the absolute property of the suppliant Company. (*b*) That there was not reserved to Your Majesty at the time of the said grant or at any time or to any person any power to set aside for native reserves any of the land or property comprised in the North Charterland Concession. (*c*) That the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928, if and so far as it purports so to set aside the lands of the suppliant Company is void and of no effect." Those three sub-paragraphs I think constitute the first claim. The second or alternative claim is set out in sub-para. (*d*) of the prayer of the Petition and is as follows: "In the alternative: (*d*) That the suppliant Company is entitled to compensation in respect of the lands of the suppliant Company set aside as native reserves by the said Order in Council."

His Majesty's Attorney-General has demurred to the Petition of Right and claims that the 1928 Order in Council, that is the Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928, affords a complete answer to the claim of the suppliant Company not only to the land set aside for Native Reserves but also to any claim to compensation in respect of this setting aside.

The suppliant Company answers to the demurrer by claiming first that the 1928 Order in Council is void and of no effect, and secondly (but this is only in the alternative) that if the 1928 Order in Council is not void, then the suppliant Company is according to the true construction of that Order entitled to compensation in respect of the compulsory taking of the land in question.

Lionel Cohen K.C. and *T. D. D. Divine* for the suppliant Company.

Sir William Jowitt A.-G. and *C. Stafford Crossman* for the Crown on demurrer. The Petition of Right is bad in substance and in law. The Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928, is a complete answer to the suppliant Company's claim.

The Order has the force and effect of a statute duly passed by Parliament by virtue of the Foreign Jurisdiction Act, 1890.

This Order applies not only to the land set aside for Native Reserves, but also to any claim for compensation put forward by the suppliant Company.

[LUXMOORE J. The Order in Council is a legislative act.]

Yes, the Order has the same effect as an Act of Parliament and the Court cannot therefore assist the petitioners.

[*Lionel Cohen K.C.* If the Order has that effect it is in a foreign jurisdiction, and having regard to *Rex* v. *Minister of Health. Ex parte Yaffe* (1) it is ultra vires and the question can be decided here.]

That case can be distinguished from the present one. The suppliant Company would be entitled to compensation if it had been reserved by the Order in Council, but the Petition of Right cannot be founded in tort. The petitioners therefore are compelled to allege an implied contract to pay compensation: but see *Attorney-General* v. *De Keyser's Royal Hotel.* (2) The Order in Council of 1928 is effective: *Sobhuza II.* v. *Miller.* (3)

[LUXMOORE J. referred to *Duff Development Co.* v. *Government of Kelantan* (4) on the question of obtaining the opinion of a Secretary of State as to the nature of the relationship of the Crown to Northern Rhodesia subsisting in 1928.]

The same point arose in *Rex* v. *Crewe* (*Earl*). (5) A Secretary of State is authorized by the Foreign Jurisdiction Act, 1890, to give a decision on this question, which is final.

[The question was therefore submitted to the Secretary of State for the Colonies, as stated below in the judgment of the learned judge.]

As to the intention of the Legislature to grant compensation when injury might result, see *Hammersmith, etc., Ry. Co.* v. *Brand.* (6)

Lionel Cohen K.C. and *T. D. D. Divine* for the suppliant Company, petitioners. The Order in Council of 1928 in so far as it affects the Native Reserves has no effect. At the date of the Order the suppliant Company was entitled to the

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(1) [1930] 2 K. B. 98, 145, 157.

(2) [1920] A. C. 508, 523.

(3) [1926] A. C. 518.

(4) [1924] A. C. 797.

(5) [1910] 2 K. B. 576, 594, 607.

(6) (1868–9) 4 H. L. 171, 193, 196.

North Charterland Concession by virtue of a Crown grant. It is a principle of the common law that the Crown cannot derogate from its grant and this principle is not affected by the Foreign Jurisdiction Act, 1890. Further the Order in Council does not in terms exclude the right of the suppliant Company to compensation. The taking away of property otherwise than with compensation cannot be imputed to the Legislature unless the intention is clearly expressed in unequivocal terms.

The Crown delegated to the Chartered Company certain of its administrative powers which are not the same as legislative. It is submitted that the power of the Chartered Company to make grants of land was derived not from the Orders in Council but from its charter, which is an exercise by the Crown of its prerogative and not an act of the King in Council.

Our right having been acquired from the Crown by a grant cannot be taken away. If the Crown had not the jurisdiction in Northern Rhodesia which it purported to exercise by an Order under the Foreign Jurisdiction Act, the Order in Council did not have the effect of an Act of Parliament; it is void. The highest jurisdiction the Crown can have is only over annexed or conquered territory, which is at the mercy of the Crown: see *Campbell* v. *Hall* (1), which clearly shows that if a grant is made by the Crown, without any power to revoke being reserved, the Crown cannot go back on its own grant; also *Rex* v. *Larwood* (2); Chitty on Prerogatives of the Crown (1820), p. 400; Chalmers' Opinions of Eminent Lawyers (1814), vol. i., p. 232. The King in Council is acting in an executive and not in a legislative capacity.

[LUXMOORE J. As regards protected territories, is not legislation carried out by the King in Council? That is, the legislative power in regard to these territories is the King in Council?]

That would depend upon the assumption that if the Crown has made a grant of land the grant was made by the King in an executive capacity.

[LUXMOORE J. No. Under the royal prerogative.]

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(1) 1 Cowp. 204.

(2) (1694) 1 Raym. 29.

According to the principle that the Crown cannot derogate from its own grant, it cannot by a further act of the prerogative take away what it has granted.

[LUXMOORE J. The act may be the legislative act of the King in Council and not the act of the King under the prerogative. You say if the Crown has granted land in the exercise of its prerogative, then in its legislative capacity it can do nothing which would result in a derogation?]

That is the necessary inference to be drawn from *Campbell* v. *Hall* (1); and see Anson on Law and Custom of the Constitution, 3rd ed., vol. ii., Part II., p. 76, on restrictions of the Crown to legislate by Orders in Council.

The Foreign Jurisdiction Act, 1890, imposes no jurisdiction; and that being so, it is submitted, what jurisdiction has the Crown?

[LUXMOORE J. If your argument is right and the Crown cannot derogate from its grant, the Crown will be prevented for all time from passing any legislation which might restrict the rights of the owner of the land. It would be derogating from the grant to pass legislation which would expropriate the land granted on payment of compensation.]

That may be so.

[LUXMOORE J. If that is the case the granting of land and nothing more would in itself fetter the right of the Crown to legislate. The question seems to be, what are the Crown's powers to legislate in respect of a Protectorate? Is it fettered in any way?]

It is submitted that after a grant by the Crown the Imperial Parliament may derogate from the grant, but the King in Council cannot.

For the earlier history of foreign jurisdiction, see Hall on Foreign Powers and Jurisdiction (1894), pp. 8–10.

In this particular case the contrast is not between a legislative and an executive act but between legislation by the Imperial Parliament and acts of any kind in exercise of the prerogative. In this particular Protectorate a legislative body has been established by an Order, the jurisdiction is dependent on the prerogative and this prerogative does not permit the Crown to derogate from own grant: *In re Southern Rhodesia* (1); *R.* v. *Hampden.* (2)

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(1) 1 Cowp. 204.

The title to land granted by the Charterland Company under its charter was indefeasible, and the Crown cannot by any act defeat that title.

On the question of compensation. The Order in Council contains no provision that a person whose land is taken under it shall not be entitled to compensation. Compensation should be payable on the principle that the intention to take away the subject's property without giving him a legal right to compensation for the loss of it cannot be imputed to the Legislature unless that intention is expressed in unequivocal terms. In the grant in this case to the petitioners there is a right to compensation if the land is taken back for public purposes; that obviously includes Native Reserves. When the Crown took over the administration of the Chartered Company over Northern Rhodesia it must have taken over the rights of the Chartered Company as such administrator. Therefore in 1928 the Crown could have resumed possession of land for public purposes on payment of compensation. See *Commissioner of Public Works* (*Cape Colony*) v. *Logan* (3) for the enunciation of the principle not to impute to the Legislature an intention to take away property from an individual unless clearly expressed; also *London and North Western Ry. Co.* v. *Evans.* (4) There is nothing in the 1928 Order negativing the right to compensation even in equivocal terms, but the contrary. The demurrer ought to be overruled.

Sir William Jowitt A.-G. in reply. The argument put forward by the suppliant Company cannot be supported. If it were correct, it would be almost impossible to carry on the administration of Protectorates any more. The argument for the suppliant Company really proceeds from a misapprehension of the effect of the real constitutional position of the King acting in Council. The principle of legislation over a Protectorate has been by the King in Council, the legislative power over a Protectorate has never been made use of by means of an Act of Parliament. It ought not to be suggested that if by a grant something has been done, that that cannot be altered by a legislative act.

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(1) [1919] A. C. 211.

(2) (1637) 3 St. Tr. 825.

(3) [1903] A. C. 355, 359.

(4) [1893] 1 Ch. 16, 28.

[LUXMOORE J. Is it not a derogation of grant? Must not all grants be subject to legislative acts?]

Yes. The power under discussion for the King in Council, acting on the advice of his responsible ministers, to legislate is a very ancient power and could not formerly be subject to any restriction. In s. 12 of the Foreign Jurisdiction Act, 1890, there is a provision that an Order in Council shall be void if, for instance, it is repugnant to the provisions of an Act of Parliament: *Rex* v. *Crewe* (*Earl*). (1)

[LUXMOORE J. If an Order is made in purported pursuance of the Act of 1890, that is enough.]

Yes. Look at such cases as *Theobald* v. *Crichmore* (2) for the case of a person acting in a bona fide belief he is proceeding under a statute, and *Rex* v. *Minister of Health. Ex parte Yaffe*. (3) An Order has legislative validity whether in excess of jurisdiction or not so long as it is made in pursuance of the Act and in intended performance of it: see s. 11.

[LUXMOORE J. Apart from any other question, the only fetter on the power of the Crown is one imposed by an Act of the Imperial Parliament?]

Yes.

[LUXMOORE J. Therefore it is only an Act of Parliament which can impose a fetter. There is an express provision in the Foreign Jurisdiction Act, 1890.]

Yes; otherwise it is difficult to contemplate by what means a fetter can be imposed upon a supreme Legislature. In a Protectorate the supreme legislative body is the King in Council, and the power wielded is absolute unless a limitation is imposed upon it by Parliament. The case of *Campbell* v. *Hall* (4) is distinguishable from the present one and is inapplicable. Lord Mansfield's dictum could not now be accepted having regard to s. 12 of the Foreign Jurisdiction

(1) [1910] 2 K. B. 576, 611.

(2) (1818) 1 B. & Ald. 227.

(3) [1930] 2 K. B. 98, 131.

(4) 1 Cowp. 204, 208, 209.

Act, 1890: see also remarks of Vaughan Williams L.J. in *Rex* v. *Crewe* (*Earl*) (1), where he refers to the Act. The suppliant Company's argument on this point is without substance.

As to the claim by the suppliant Company for compensation, it is submitted that this claim cannot be one founded on contract against the Crown.

[*Lionel Cohen K.C.* The claim is alternative, first under the Order of 1928 and secondly under the original contract with the Chartered Company. The Chartered Company is agent for the Crown. If that is so then there is a direct contractual relationship which clause 6 of the deed of grant covers.]

[LUXMOORE J. If that is the point you seek to make, the petition may require amendment.]

[A lengthy discussion ensued as to the amending of the petition and the difficulty of dealing with the plea of compensation on a contract as it affected the demurrer.]

Lionel Cohen K.C. The suppliant Company will rely only on the right (if any) to compensation conferred by the Order.

[LUXMOORE J. The petition need therefore not be amended.]

Sir William Jowitt A.-G. One has therefore to look at the Order of March 22, 1928; there is no express provision for compensation there. It is submitted no implied right can be inferred from the wording of the Order which has the force of an Act of Parliament.

C. Stafford Crossman following. Rights conferred by a statute must be in clear and express terms and not by implication: Craies on Statute Law, 2nd ed., p. 123; *Auckland Harbour Board* v. *The King*. (2) [He discussed the Order in Council of March 22, 1928.]

Lionel Cohen K.C. replying referred to *Attorney-General* v. *Horner* (3); *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (4)

Cur. adv. vult.

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(1) [1910] 2 K. B. 576, 599, 602, 607.

(2) [1924] A. C. 318, 326.

(3) (1884) 14 Q. B. D. 245.

(4) (1882) 7 App. Cas. 178.

June 26. LUXMOORE J. [His Lordship stated the facts substantially as set out above, and continued :] As I understand it, Mr. Lionel Cohen's argument on the first point is this : he claims that the 1928 Order in Council is void so far as it purports to set aside Native Reserves, because the North Charterland Concession was at the date of the Order in Council the property of the suppliant Company, having been granted to its predecessor in title (the Old Company) by the Chartered Company under its Charter which in its turn was granted to the Chartered Company by the Crown. In consequence, the suppliant Company at the date of the 1928 Order in Council held the North Charterland Concession, including the land set apart for Native Reserves under that Order, by virtue of a grant from the Crown. It is further argued that it is a principle of the common law that the Crown cannot derogate from its grant and that this principle is not overridden or affected in any way by the Foreign Jurisdiction Act, 1890, under which the 1928 Order in Council was purported to be made. That consequently therefore the Order in Council of 1928 was wholly inoperative and ineffective so far as it purported to take away the land comprised in the Native Reserves from the suppliant Company and to vest that land in His Majesty's Secretary of State.

During the course of the argument a question arose as to the nature of the relationship of the Crown to the territory of which the North Charterland Concession formed part, and in order to settle this question I submitted to His Majesty's Secretary of State for the Colonies for his decision under the Foreign Jurisdiction Act, 1890, s. 4, two questions : "Was the territory now known as Northern Rhodesia on March 22, 1928, under the protection of His Majesty ?" or "Was it at that date part of His Majesty's Dominions ?" The decision of His Majesty's Secretary of State for the Colonies, which by the provisions of the Act is conclusive, is that on March 22, 1928, Northern Rhodesia was a territory under His Majesty's protection. It did not then and does not now form part of His Majesty's Dominions.

There can I think be no question but that the legislative authority over territory not being part of His Majesty's Dominions but constituting a Protectorate of the Crown is the prerogative of the Crown and that there can be no fetter on this prerogative except such as is imposed by the Imperial Parliament. By the Foreign Jurisdiction Act, 1890, the Imperial Parliament has enacted that the prerogative power of legislation in respect of Protectorates is to be exercised by Order in Council and that these Orders when made are to have effect as if enacted by the Foreign Jurisdiction Act, 1890, that is they are to have effect as if enacted by the Imperial Parliament. There is a provision by s. 12, sub-s. 1, that if an Order in Council made in pursuance of the Foreign Jurisdiction Act, 1890, as respects any foreign country is in any respect repugnant to the provisions of any Act of Parliament extending to His Majesty's subjects in that country or repugnant to any Order or regulation made under the authority of any such Act of Parliament or having in that country the force and effect of any such Act, it shall be read subject to that Act, Order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be void. The same section also lays down in sub-s. 2 that an Order in Council made in pursuance of the Act shall not be or be deemed to have been void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of some such Act of Parliament, Order or regulation as aforesaid.

The legislative power of the Crown in respect of its prerogative over protectorates is—except as provided in the Foreign Jurisdiction Act, 1890—in the manner to which I have just referred, wholly unfettered unless it can be said that this legislative power is fettered in so far as land within any particular protectorate is concerned by the doctrine of derogation from grant.

Now when the Crown is not the legislative authority, all grants of land, whether by the Crown in the exercise of its prerogative or by grantees other than the Crown, must necessarily be subject to the legislative authority, and the circumstances of the grant cannot impose any fetter or check on that authority. Every grant of this nature must of necessity be subject to the unfettered exercise by that legislative authority of its legislative powers.

In the present case, assuming as I am bound to do for the purposes of this demurrer (though of course it is not admitted on the pleadings) that the North Charterland Concession was in fact granted by the Crown, the grant was an executive and not a legislative act, and it is difficult to understand how the mere grant without anything more can have imposed a fetter on the supreme legislative power of the Crown. The Crown in exercising its supreme legislative authority is exercising a prerogative to which every grant must in my opinion necessarily be subject, for to hold otherwise would be to deprive the Crown of any legislative power whatever in respect of land which had at any time before the exercise of its legislative powers been granted by the Crown and to this extent to put all land so granted outside the jurisdiction of the Crown as the supreme legislative authority. In my judgment the doctrine of derogation from grant cannot be applied in the case of a grant by the Crown so as to deprive it of its paramount right to legislate for the Protectorate in which the subject of the grant is situate. To do so would be to place the Crown with reference to any land granted by it in an inferior position to that occupied by other owners of land within the same Protectorate.

Mr. Cohen in support of his argument relied on the decision in *Campbell* v. *Hall* (1), but in my judgment that case is wholly different to and distinguishable from the present one. In the first place it related to territory which in fact formed part of the dominions of the Crown. The Crown in the exercise of its prerogative had in fact granted to that territory a legislative assembly, and that being so it was impossible apart from an Act of the Imperial Parliament for anybody other than the legislative assembly to exercise legislative functions, and on this ground it was said that the Crown could not derogate from its grant, the grant being of

(1) 1 Cowp. 204.

legislative authority and not of land. In my opinion the use of the phrase "derogation from grant" in the sense that that phrase is used in connection with grants of land by a grantor is inapt in a case like the present. The Crown in exercising its legislative powers cannot be said to be acting in derogation of grants made by it although the effect of the exercise of the legislative powers may be to affect grantees of land from the Crown. I think the true explanation of the decision in *Campbell* v. *Hall* (1) is that the Crown had conferred an unfettered legislative authority on the territory in question (the Island of Grenada) and having retained for itself no overriding legislative authority could no longer interfere in legislative matters. It is further to be observed that the case of *Campbell* v. *Hall* (1) was decided long before the passing of the Foreign Jurisdiction Act, 1890, and it certainly seems doubtful whether since the passing of that Act the decision in the case of *Campbell* v. *Hall* (1) can have any further operation.

In my judgment the Crown cannot deprive itself of or fetter its legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists.

This leaves the second question to be determined—namely, assuming that the Order in Council is valid, as I have held it is, is the suppliant Company entitled to compensation in respect of the Native Reserves which have been vested by the Order in Council in the Secretary of State ?

The answer to this question depends upon the construction of the Order in Council dated March 22, 1928. Before referring to the actual terms of the Order I think it advisable to state that it has been urged that in construing an Order of this kind the Court must bear in mind that it is a canon of construction that an intention to take away the property of a subject without any right to compensation will not be imputed to the Legislature unless such intention is expressed in unequivocal terms. It is unnecessary to refer to any of

(1) 1 Cowp. 204.

the authorities where this has been laid down. It is sufficient to state that this canon of construction is well recognized and has been repeatedly stated and acted upon. Obviously this canon of construction can only be applicable in expropriation cases where there is ambiguity in the actual words to be construed, it cannot apply where there is no ambiguity, for example where there is an expropriation by the act itself and there is complete absence of any words capable of being construed as conferring a right to compensation, and in this connection it seems to me that different considerations apply to a case where there is an actual expropriation as opposed to a power to expropriate. Further in considering a question of this kind it must be remembered that rights cannot be inferred by implication in a statute and that in order to justify payment out of the Public Exchequer there must be the clear authority of Parliament for the payment: see *Auckland Harbour Board* v. *The King.* (1)

Now with these considerations in mind I approach the consideration of the Order in Council. The Order contains a recital of the agreement of September 29, 1923. That recital shows that the Crown considered that it had reserved by the agreement itself the right to set apart Native Reserves out of the North Charterland Concession without any further payment than that provided as the consideration for the agreement itself. The Order proceeds in Clause 3 (2.) to recognize and confirm all alienations of land made by the Chartered Company before April 1, 1924, and duly registered according to law. This is a recognition and confirmation of the alienation effected by the North Charterland Concession. By Clause 6 those parts of the North Charterland Concession which are specified in the Schedule to the Order and described as "Native Reserves" are—and I quote the precise words of the clause—"hereby vested in the Secretary of State and set apart in perpetuity for the sole and exclusive use and occupation of the natives of Northern Rhodesia." It is to be observed that there is not one word in the Order referring expressly to compensation, indeed the presence of the recital

(1) [1924] A. C. 318.

as to the agreement of September 29, 1923, can only lead to the conclusion that no one ever contemplated that any compensation would be payable in respect of the setting apart of these Native Reserves. Further the land in question is by the Order itself vested in the Secretary of State. This is a far stronger step than conferring a power on the Secretary of State to take the land. The only way in which it can be suggested that the Order can be construed so as to provide compensation for the taking of the Native Reserves is by implication. It is said that the implication is to be found in Clause 3 (2.) to which I have already referred—namely, in the recognition and confirmation of the grant of the North Charterland Concession, because that grant contains a power to expropriate any part of the concession required for public purposes on payment of compensation. But it is difficult to assent to this argument, for if this were the intention of the Order it would have been wholly unnecessary to make any further provision therein for the taking of the Native Reserves and the expropriation would have been worked out by reference to arbitration, as provided by the grant. Yet we find that the expropriation is made by the Order without any reference to compensation or the method of its assessment. The arbitration provisions in the grant could not apply, because the taking is not under the grant but wholly outside the grant and there is no provision for the taking of the land first and the fixing of the price after it has been taken. Moreover the vesting effected by Clause 6 is not purported to be made in exercise of any power contained in any other document. It is an overriding legislative enactment. This is made abundantly clear by the words used: "The lands . . . . are hereby vested." The vesting is immediate, and, as I have said before, there is no mention of compensation.

In my opinion it is impossible to construe the Order in Council of 1928 as conferring on the suppliant Company any right to compensation, on the contrary I am satisfied that the Order on its true construction negatives any such right. It follows therefore that in my judgment the

LUXMOORE J.

1930

THE NORTH CHARTERLAND EXPLORATION COMPANY (1910) LD. v. THE KING.

demurrer succeeds and I hold that the 1928 Order in Council is a complete answer to the Petition of Right. I accordingly dismiss it.

Solicitors: *Parker, Garrett & Co.; The Solicitor to the Treasury.*

A. R. T.

BENNETT J.

1930

Oct. 16.

WIMBLEDON AND PUTNEY COMMONS CONSERVATORS *v.* TUELY.

[1930. W. 1771.]

Corporation—Constituted by Act of Parliament—Power to levy Rates—Power to employ Labour—Gratuitous Payments—Superannuation Fund for retired Employees—Intra vires—Commissioners Clauses Act, 1847 (10 *&* 11 *Vict. c.* 16), *s.* 65—*Wimbledon and Putney Commons Act,* 1871 (34 *&* 35 *Vict. c. cciv.*), *ss.* 2, 8, 32, 36, 39, 74, 82, 90.

Where a corporation, constituted by Act of Parliament, has power to levy rates and employ labour in order to carry out its undertaking, it can make regulations enabling it to provide pensions, annuities or superannuation allowances for employees retiring by reason of age, infirmity or otherwise, notwithstanding that it has no express power.

Cyclists' Touring Club v. *Hopkinson* [1910] 1 Ch. 179 followed.

ADJOURNED SUMMONS.

The plaintiffs were a corporation, constituted by the Wimbledon and Putney Commons Act of 1871. Sect. 8 of that Act provided that there should be a body of Conservators for carrying the Act into execution, and who were thereby incorporated by the name of the Wimbledon and Putney Commons Conservators. Sect. 32 vested the two commons in the Conservators. Sect. 36 provided that the Conservators should at all times preserve, as far as might be, the natural aspect and state of the commons, and to that end should protect the turf, gorse, heather, timber and other trees, shrubs and brushwood thereon. Sect. 39 gave the Conservators power to drain and improve the commons; to make and maintain roads; to make and maintain ornamental ponds; to plant trees and shrubs; to build lodges, not exceeding six in number, to be used for residences of common-keepers and officers, and for no other purpose; and to repair the lodges and other buildings vested in them. Sect. 74 provided that for the purposes of paying their expenses of management, and other expenses of executing the Act, the Conservators might from time to time "make, assess, order payment of, and levy a rate or rates" on the tenants or occupiers of dwelling-houses within a certain radius of the commons. Sect. 82 provided that the receipts of the Conservators from the rates under the Act, and other revenue under the Act, should be carried to and constitute a fund called the Wimbledon and Putney Commons Conservancy Fund, and that that fund should be applied from time to time in and for the purposes of the execution of the duties of the Conservators under the Act, and not otherwise. Sect. 90 provided that the Conservators might from time to time appoint officers for securing the execution of the Act, and by-laws thereunder. The Act also, by s. 2, incorporated the Commissioners Clauses Act, 1847, and s. 2 of that Act provided that "the commissioners may from time to time appoint and employ a treasurer, clerk, collector, assessor, and all such other officers to assist in the execution of this and the special Act as they shall think necessary and proper, and from time to time remove any of such officers, and appoint others in the room of such as shall be so removed . . . . and may, out of the moneys to be raised for the purposes of this and the special Act, pay such salaries and allowances to the said officers respectively as the commissioners shall think reasonable."

The plaintiffs employed a number of persons as keepers of the commons and as labourers, and it was in evidence that the class of man required by them for the duties to be performed were experienced, reliable, steady and physically capable men, and that they would be greatly assisted in attracting to their service the best kind of man for the duties required if they were able to hold out the prospect of provision for old age or infirmity by means of some system of pensions.

BENNETT J.
1930
WIMBLEDON AND PUTNEY COMMONS CONSERVATORS v. TUELY.

The plaintiffs now applied to the Court to determine: (1.) Whether, according to the true construction of the Acts of 1871 and 1847, the plaintiffs might properly pay pensions, annuities or superannuation allowances out of the Wimbledon and Putney Commons Conservancy Fund to persons who were or might hereafter be in the service of the plaintiffs, and should hereafter retire from their service by reason of age, infirmity or otherwise; (2.) whether the plaintiffs might properly make provision for pensions, annuities or superannuation allowances by means of a scheme of insurance and payment of premiums carried out with the co-operation of an insurance company, and might properly agree (*a*) with employees entering the service of the plaintiffs for the first time; (*b*) with employees already in their service who had not yet reached an age or condition proper for retirement; and (*c*) with employees in their service who had reached an age or condition proper for retirement for the provision of pensions, annuities or superannuation allowances, and for the payment of the appropriate premiums either partly out of contributions by the plaintiffs and partly out of deductions from the wages of the employees, or wholly by payments to be made by the plaintiffs, and might properly make the payments required for these purposes or any of them out of the Conservancy Fund.

The defendant represented all the persons liable to pay rates under the Act of 1871.

Wilfrid Greene K.C. and *Stafford Crossman* for the plaintiffs. The reason the plaintiffs have thought it necessary to come to the Court to have this question settled is that there is a dictum of Keating J. in *Marchant* v. *Lee Conservancy Board* (1) that a corporation, constituted by an Act of Parliament, cannot make a retiring allowance to an employee unless there is an express power in their Act enabling them to do so. It is a very narrow view to take that a corporation can make no provision for its employees beyond a weekly wage. Under

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(1) (1874) L. R. 9 Ex. 60, 62.

s. 65 of the Commissioners Clauses Act, 1847, the commissioners may appoint and employ any officers they think necessary and proper to assist in the execution of that Act and the special Act, and they may pay the officers so employed any salaries and allowances they think reasonable. The plaintiffs are entitled under that section to make provision for their retiring employees. This case is entirely covered by *Cyclists' Touring Club* v. *Hopkinson* (1), where it was held that a grant of a pension by way of gratuity to a retired secretary was intra vires. There is no distinction between a body like the Cyclists' Touring Club and a corporation like the plaintiffs. No Act can set out everything Conservators can do. There is no rule that the Court should construe an Act of Parliament in a more narrow sense than a memorandum of association : see judgment of Vaughan Williams L.J. in *Phillips* v. *London School Board* (2) in dealing with s. 35 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75). *Henderson* v. *Bank of Australasia* (3) was a case of a bank, incorporated by charter. The dictum of Keating J. in *Marchant* v. *Lee Conservancy Board* (4) should not affect the decision in this case. If that dictum was right, *Cyclists' Touring Club* v. *Hopkinson* (1) was wrongly decided. That dictum was in 1874, when allowances of this kind to employees were not so common as they have since become. These things must be looked at in the way business men would look at them. The plaintiffs must have the power to adopt up to date methods to attract the right type of man to carry out the duties imposed upon them by the Act.

Topham K.C. and *Wilfrid Hunt* for the defendant. The sole question here is the construction of an Act of Parliament, and it is difficult to see how a change of circumstances can alter the interpretation of an Act of Parliament. In all the cases cited the decisions affected the construction of memorandums of association. In s. 65 of the Commissioners Clauses Act, 1847, neither "salaries" nor "allowances" would include pensions to officers who have retired. The Court

(1) [1910] 1 Ch. 179.
(2) [1898] 2 Q. B. 447, 459.
(3) (1888) 40 Ch. D. 170.
(4) L. R. 9 Ex. 60, 62.

cannot imply anything that Act does not contain. There is no power in either the general Act or the special Act to grant anything in the nature of a pension. In *Phillips* v. *London School Board* (1) the payment of superannuation allowances to the persons affected was justified on the ground that it would come within their remuneration. The plaintiffs cannot go outside their powers contained in the special Act: *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (2) "Allowance" has always been construed as something small, like coal and light. The widest definition of the word was given in *Edwards* v. *Salmon.* (3) The grant of anything in the nature of a superannuation allowance to their employees by the Conservators is ultra vires, and ought not to be allowed by the Court.

[They also cited *The Queen* v. *Corporation of Ramsgate* (4) and *Hewlett* v. *Allen.* (5)]

Greene K.C. replied.

BENNETT J. The question to be decided is whether the Conservators would be acting ultra vires if they took a step which will assist them in securing the service of the best type of man for the duties they require to have performed. It seems to me that the case really is governed by the decision of Swinfen Eady J. in *Cyclists' Touring Club* v. *Hopkinson* (6), where the question was whether a club registered under the Companies Acts, but not carrying on a business for profit, could grant a pension by way of gratuity to a retired secretary. Swinfen Eady J., in deciding that such a payment was intra vires, refers (7) to the speech of Lord Selborne L.C. in *Small* v. *Smith* (8), where he said: "When you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and ought, prima facie, to follow from the authority for effectuating the main purpose by proper and general means." Swinfen Eady J. goes on to say: "In my opinion, there is no express prohibition against a voluntary payment in respect of past services. The question has apparently not arisen before in associations not for profit, but similar questions have arisen with regard to trading companies." Then he cites a passage from the judgment of Wood V.-C. in *Taunton* v. *Royal Insurance Co.* (1), in which the Vice-Chancellor said: "It is one thing to say that the directors are paying something which they are not bound to pay, and quite another thing to say that they are making payments for purposes not within the objects of the company. In this case the answer of the directors is, that they make the payments as the course most conducive to the objects and the interests of the company." Then Swinfen Eady J. goes on to say: "In my opinion, in promoting the objects of a club such as the present one, it is most desirable to encourage faithful service amongst the officers and servants. This is a club with some 20,000 members, and it must obviously rely in great measure upon the services of the employees. It is of as much importance to a club as to a trading company to be able to hold out such inducements to officers and servants as will secure the best assistance." Then he concludes by saying (2): "In my opinion, the payment to a retired servant of the club by way of an annuity, or by way of pension, or by way of gratuity, is within the powers of the club as being a payment in furtherance of the best objects of the club." In that sentence, I think, Swinfen Eady J. states the ground upon which he decided in favour of the validity of the payment in the case of *Cyclists' Touring Club* v. *Hopkinson* (3), and I can find no sound ground upon which the present case or the position of the Conservators can be distinguished from the position of the Cyclists' Touring Club. These pensions or superannuation allowances seem to me to be, on the evidence, payments which will secure for the Conservators servants of the most desirable type and are therefore payments made to secure the efficient performance of the duties which the Act of Parliament throws upon the Conservators. Upon that ground, therefore, in my judgment, the proposed payments are within the powers of the Conservators.

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(1) [1898] 2 Q. B. 447.
(2) (1875) L. R. 7 H. L. 653.
(3) (1889) 23 Q. B. D. 531.
(4) (1889) 23 Q. B. D. 66.
(5) [1894] A. C. 383.
(6) [1910] 1 Ch. 179.
(7) [1910] 1 Ch. 186.
(8) (1884) 10 App. Cas. 119, 129.

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(1) (1864) 2 H. & M. 135, 141.
(2) [1910] 1 Ch. 187.
(3) [1910] 1 Ch. 179.

I do not think that there is anything in the decision in *Marchant* v. *Lee Conservancy Board* (1) which is contrary to the conclusion at which I have arrived. It seems to me that the sentence in Keating J.'s judgment which Mr. Greene called my attention to was really no part of the decision in that case. The question upon which Keating J. is reported as having expressed an opinion was not argued nor was a decision upon it necessary for any question which the Court in that case had to decide.

Therefore, I propose on this summons to answer questions (1.) and (2.) in the affirmative.

Solicitors for the plaintiffs: *Horne & Birkett.*

Solicitors for the defendant: *Blyth, Dutton, Hartley & Blyth.*

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(1) L. R. 9 Ex. 60.

P. J. B.

In re STRATTON.

KNAPMAN *v.* ATTORNEY-GENERAL.

C. A.
1930
Nov. 7.

[1929. S. 3530.]

Charity—Bequests to the Vicar for the time being of the Parish of M.—" Parochial institutions or purposes "—Validity.

A testatrix bequeathed part of the proceeds of sale of a house and a sum of 1000*l.* to the vicar for the time being of the parish of M, " to be by him distributed at his discretion among such parochial institutions or purposes as he shall select " :—

Held, that as the words " parochial institutions or purposes " might include objects which were not charitable in the legal sense, and the gifts contained no words limiting the vicar's discretion to such of them as were so charitable, the gifts were invalid.

Dictum of Lord Macnaghten in *Dunne* v. *Byrne* [1912] A. C. 407, 410 applied.

In re Bain [1930] 1 Ch. 224 and *In re Barclay* [1929] 2 Ch. 173 distinguished.

Decision of Bennett J. [1930] 2 Ch. 151 affirmed.

Appeal from a decision of Bennett J. (1)

Eliza Catherine Stratton by a first codicil, dated September 27, 1920, to her will made in February, 1920, directed that her trustees should hold the residue of the proceeds of sale of a house " in trust for the vicar for the time being of the parish of Mortlake in the county of Surrey to be by him distributed at his discretion among such parochial institutions or purposes as he shall select."

By a second codicil to her will, dated March 15, 1923, she bequeathed " the sum of 1000*l.* to the vicar for the time being of the parish of Mortlake in the county of Surrey to be by him distributed at his absolute discretion among such parochial institutions or for such parochial purposes as he shall select."

The testatrix died a spinster on February 23, 1929, and her will and codicils were duly proved by her executors on April 13, 1929.

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(1) [1930] 2 Ch. 151, reported sub nom. *In re Stratton. Stratton* v. *Attorney-General.*

C. A.
1930

Stratton, *In re.*
Knapman v. Attorney-General.

An originating summons was taken out by her executors for the determination of the question whether these bequests were valid charitable gifts or whether they or either of them failed to any and what extent.

In support of the summons the plaintiffs filed an affidavit to which they exhibited a copy of the Mortlake with East Sheen Parish Magazine, showing the various activities of the church.

Bennett J. held that both the gifts were invalid.

The vicar of Mortlake appealed. The appeal was heard on November 7, 1930. In the Court below it was argued on behalf of the residuary legatees that if the gifts were held invalid they and not the next of kin would be entitled. The Court having decided in favour of the residuary legatees the next of kin accepted the decision and were not represented on the appeal.

J. Norman Daynes for the appellant. The word "parochial" used in the gifts is an ambiguous word and may refer either to the civil or the ecclesiastical parish. That being so, it is submitted that the Court ought to give it a benevolent construction in favour of charity and hold the word refers to the ecclesiastical parish. In construing the gifts the Court ought to take into consideration (*a*) the character of the trustee, that he is the vicar of the parish, and (*b*) the close association of the testatrix with the activities of the church. There is nothing in the meaning of the word "parochial" to suggest anything outside the charitable boundary, and it is submitted, therefore, that "parochial purposes" here mean the "ecclesiastical purposes of the church." The authorities show that a gift wide in its term can be restricted by the character of the trustee: *Thornber* v. *Wilson*. (1)

[Lord Hanworth M.R. referred to *In re Barclay*. (2)]

In *In re Garrard* (3), where a testatrix bequeathed 400*l*. to the vicar and churchwardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit, Joyce J. held that the bequest was a good charitable gift for ecclesiastical purposes in the parish. The Court will in the present case take into account the knowledge of the testatrix of the activities of the church: *In re Rees.* (1) The Court ought not to confine religious purposes within too narrow limits, or to destroy the charitable character of a gift by unduly limiting its scope: *In re Charlesworth.* (2)

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(1) (1855) 3 Drew. 245; (1858) 4 Drew. 350.

(2) [1929] 2 Ch. 173.

(3) [1907] 1 Ch. 382.

[LORD HANWORTH M.R. I think we should look at *In re Bain* (3) and *In re Barclay* (4), where we recently considered the cases on the present point.]

In *In re Bain* (3) the Court used the word "parochial" in the widest sense. Here it is submitted that the word is used in a more restricted sense: see *In re Van Wart.* (5)

In *In re Barclay* (4) it was held that a gift to the Superior upon trust for the benefit of the church at Farm Street as he might in his discretion think fit was a valid gift.

[He also referred to *Houston* v. *Burns.* (6)]

Stafford Crossman for the Attorney-General supported the contention that the gifts were valid charitable bequests.

H. B. Vaisey K.C. and *Mumford* for the respondent residuary legatees were not called upon to argue.

A. J. Belsham for the respondent executors.

LORD HANWORTH M.R. This is an appeal from a judgment of Bennett J., and the question is whether two bequests which I will read in a moment are valid. One approaches this case with a sincere desire to give effect to the intentions of the testatrix as far as is possible according to the rules of law. We may be satisfied that the testatrix was a strong supporter of the church, and did desire to leave money by her will to be placed in the hands of the vicar in order to carry on work in which she was interested, and we would gladly give effect to her desires as expressed in the codicils to her will, if we could; but we must comply with such limitations as the law has made applicable to such bequests.

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(1) [1920] 2 Ch. 59.
(2) [1910] W. N. 18.
(3) [1930] 1 Ch. 224.
(4) [1929] 2 Ch. 173.
(5) Times Newsp., Feb. 17, 1911.
(6) [1918] A. C. 337.

But it is not every object which is charitable in common parlance that is recognized as charitable in law. Further, if a trust is to be constituted, it must be expressed in such terms as the Court, if appealed to, would be able to carry out, and it cannot give effect to a trust which is declared in loose words. We are therefore brought back to the question whether the terms used by the testatrix in these gifts are sufficient to create good charitable trusts. Those terms in the first codicil are these: "to the vicar for the time being of the parish of Mortlake in the county of Surrey to be by him distributed among such parochial institutions or purposes as he shall select" and in the second codicil they are: "to the vicar for the time being of the parish of Mortlake in the County of Surrey to be by him distributed at his absolute discretion among such parochial institutions or for such parochial purposes as he shall select." There is no difficulty in identifying the vicar for the time being, and discretion is given to him and his successors in the office of vicar. But as regards Mr. Norman Daynes' contention that the nature of the trust may be deduced from the fact that the trustee was the vicar, Lord Macnaghten in *Dunne* v. *Byrne* (1) said: "It is difficult to see on what principle a trust expressed in plain language, whether the words used be sufficient or insufficient to satisfy the requirements of the law, can be modified or limited in its scope by reference to the position or character of the trustee." It is not without significance that the words of the gifts are "among such parochial institutions or purposes as he shall select," and the attention of the Court has been directed to the various parochial activities which are shown in the parish magazine, and which are doubtless very excellent in themselves. But the words of the codicils impose no restriction upon the activities to which the trust moneys might be applied nor is the vicar's discretion in any way limited. The only condition is that what is done shall have something to do with the parish; that might be something to do with the church or it might not. In law it is not every parochial purpose

(1) [1912] A. C. 407, 410.

which is a charity. Many objects are commonly called charitable, but if they are merely benevolent, or humanitarian, then, however excellent they may be, they are not necessarily charitable in the legal sense. Where in these codicils are there any words to be found restricting the powers of the vicar to purposes deemed by law to be charitable? We can find none.

It is true that in *In re Bain* (1) Lawrence L.J. and I found on the facts that the vicar in that case was limited to applying the gifts to objects in connection with the church, so that the activities of the trust were thereby confined to matters connected with religion, which the law holds to be charitable, and we therefore held that there was a good charitable trust; but it must not be overlooked that Russell L.J. took a different view. In *In re Barclay* (2) there was also an indication that the moneys given were to be applied to religious purposes. In the present case there is no such indication, and we are hedged round by rules which it is our duty to follow, and we find ourselves in the same position as Bennett J., who could not find support for the view that these gifts were good charitable bequests. But for the admirable argument put before us by Mr. Norman Daynes, I should have been satisfied merely to say that I agreed with Bennett J.'s judgment. The appeal must be dismissed.

LAWRENCE L.J. I entirely agree with the judgments of my Lord and Bennett J., and I do not think I can usefully add anything.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *Jaques & Co.; Treasury Solicitor; Charles Robinson & Son.*

W. I. C.

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(1) [1930] 1 Ch. 224.

(2) [1929] 2 Ch. 173.

C. A.
1930
Nov. 26.

In re TONG.

HILTON *v.* BRADBURY.

[1929. T. 1087.]

Administration—Order of Application of Assets—Solvent Estate of deceased Testator—" Real and Personal Estate "—Income accruing after death—" Property of deceased undisposed of by will "—Lapsed Share of Income—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 32, *sub-s.* 1; *s.* 34, *sub-s.* 3; *Schedule I., Part II., para.* 1.

A testator by his will, after directing his executors to pay all legacies free of estate duty and to pay out of his estate any duty which might become payable on any gift made before his decease and after bequeathing certain legacies and annuities and the use and benefit of two freehold cottages, directed them to collect the income from the remainder of his estate and to pay 75 per cent. thereof to his sister during her life and on her death to invest the income of the whole of the estate for the benefit of the children of two nieces on their attaining the age of twenty-one years. If there should be no children then the whole of the accumulated funds was to be divided between two named charities.

The will having been attested by the sister's husband, Clauson J. held that the 75 per cent. share of the income of the residuary estate was undisposed of by the will, until her death or the birth of a child to either of the nieces; and the question then arose whether the testator's funeral, testamentary and administration expenses, debts and liabilities other than the estate duty in the will mentioned ought to be paid primarily out of such undisposed of income or out of the corpus of his residuary estate:—

Held (1.), that there was nothing in the will to vary the order of application of assets contained in the First Schedule, Part II., of the Administration of Estates Act, 1925, except in regard to the estate duty mentioned above.

(2.) That the income of the residuary estate of a deceased person is included in " the real and personal estate " of the deceased made assets for payment of his debts by s. 32, sub-s. 1, of the Act, and was " property of the deceased " within para. 1 of Part II. of the First Schedule to the Act.

(3.) That the share of the income of residue of which the gift had failed was " property undisposed of by will " within para. 1 of Part II.

(4.) That the share of the income of residue in question was therefore the primary fund for the payment of the funeral, testamentary and administration expenses, debts and liabilities of the testator.

In re Lamb [1929] 1 Ch. 722 approved and applied.

Decision of Clauson J. [1930] 2 Ch. 400 affirmed.

Two Appeals from a decision of Clauson J. (1)

Livesey Tong by his will dated February 2, 1929, after appointing executors authorized them in their discretion to sell any investment and invest the proceeds in trustee stocks or to leave the investments, after paying the various legacies, exactly as they were at the date of his decease, but making preparations for any possible calls on any shares with liability. He then directed his executors to pay all legacies free of estate or legacy duty and that any duty of any kind which might become payable on any gifts he might make before his decease should be paid out of his estate, and bequeathed three legacies of 1000*l.* each and one of 500*l.* and certain annuities. The testator then bequeathed to the defendants Sarah Anne Bradbury and Eliza Emily Bradbury, the use and benefit of two cottages and land at Dales Brow Swinton free of rent for as long as they cared to occupy one of the cottages, and if that property was sold then a small cottage to be provided for them out of the proceeds of the sale. The testator then proceeded: "I direct my executors to collect the income from the remainder of my estate and to pay 75 per cent. of it to my sister, Mrs. Holt, ... during her life and on her death the income of the whole of the estate to be invested for the benefit of the children of my two nieces, Monica Holt and Alice Tong, in equal shares on attaining the age of twenty-one, and, if there are no children, then the whole of the accumulated funds to be divided between the Bolton and Leigh Infirmaries in equal shares."

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(1) [1930] 2 Ch. 400.

The testator died on March 12, 1929, leaving real and personal estate of the value of about 45,000*l.* The will had been attested by the husband of the testator's sister, Mrs. Holt, with the result that there was a lapse of the share of income bequeathed to her during her life.

An originating summons came before Clauson J. for the determination of several questions which arose in the administration of the estate, and it was held (inter alia) that the 75 per cent. share of income of the residuary estate was undisposed of by the will until the death of Mrs. Holt or the birth of a child to either Monica Holt or Alice Tong. The only question calling for report was whether the testator's debts and funeral and testamentary expenses and the duties on any bequests ought to be paid primarily out of

C. A.
1930
Tong, *In re.* Hilton *v.* Bradbury.

this undisposed of income or out of the corpus of his residuary estate.

Clauson J. said that it had been argued that the share of income in question could not be treated as real and personal estate of the deceased, as it was a fund which only came into existence after his death, but he could not think that by speaking in Part III. of the Administration of Estates Act, 1925, of that which was to be administered for the payment of the deceased's debts and liabilities as "the real and personal estate" of the deceased, the Legislature intended to discard the long settled rule of law that various categories of assets which were never in the deceased himself were regarded as part of the deceased's estate and as assets for payment of debts. He could find nothing in the testator's will dealing with the payment of funeral, testamentary and administration expenses, debts and liabilities other than estate duty, and Part II. of the First Schedule to the Act therefore applied, and the first property applicable for the purpose of making such payments was "property of the deceased undisposed of by will." "Property undisposed of by will" was in his view synonymous with "property in respect of which the deceased died intestate" and not, as had been contended, "property which the deceased had not attempted to dispose of by will." The point was so decided by Eve J. in *In re Lamb* (1), and this view was accepted by Maugham J. in *In re Kempthorne* (2), and not, as he (his Lordship) thought, questioned by the Court of Appeal in the latter case, in such a way as to make it proper for him to come to a contrary conclusion. He therefore held that the testator's funeral, testamentary and administration expenses, debts and liabilities (other than the estate duty mentioned in the will) should be primarily paid out of any property undisposed of by will, including the share of the income of residue ineffectually directed to be paid to Mrs. Holt.

The defendants, Alice Tong and Mrs. Holt, two of the testator's next of kin, appealed separately.

(1) [1929] 1 Ch. 722.

(2) [1930] 1 Ch. 268.

Grant K.C. and *Lavington* for the first appellant. By s. 32, sub-s. 1, of the Administration of Estates Act, 1925, the "real and personal estate" of a deceased person are made assets for payment of debts, and by s. 34, sub-s. 3, and Part II. of the First Schedule, para. 1, the first of the assets made liable for the payment of the debts and liabilities of a solvent testator is "property of the deceased undisposed of by will." "Property" is defined in s. 55, sub-s. 1 (xvii.), as including "any interest in real and personal property." The lapsed share of income of residue is not "property of the deceased" so as to fall within para. 1 of Part II. of the First Schedule. The residue is obtained by realizing the deceased's property, making any necessary payments out of the proceeds and investing the net proceeds. These investments were never the property of the deceased, but were at most the fruit of the realization of property of the deceased. Here, moreover, the Court is concerned with a share of the income of residue and the case is even stronger for saying that it is not property of the deceased. It came into existence after the deceased's death and arises from something which, as already contended, was never itself property of the deceased.

Even if this income be held to be property of the deceased, it is not "property of the deceased undisposed of by will." By this is meant property of which the deceased has not attempted to dispose. Here there was an effective gift to the executors and an attempted disposition of income to Mrs. Holt, which only fails because the Wills Act, s. 15, makes it null and void. Para. 1 of Part II. only applies to property of which the deceased has entirely failed to dispose, as when a testator makes a will relating to personalty only, although he also possesses realty. By "property undisposed of by will" is meant property which is not given to executors. In the case of a settlement when the legal interest in property is transferred to trustees it ceases to be the settlor's property.

[EVE J. That is so only if the settlor has substituted other persons as beneficiaries. If there were no beneficiaries, it would remain his property.]

It would not, it is suggested, remain his property but become his property by way of a resulting trust. Here the property passed into the hands of the executors for administration. They could sell it for paying debts, and it is only a share of the income arising from the residue of the proceeds of sale which is undisposed of and that is not property of the deceased. *In re Lamb* (1), which related to a share of residue, was, it is contended, wrongly decided; and this view receives support from what was said in the Court of Appeal in *In re Kempthorne.* (2) This is a stronger case than *In re Lamb* (1), as here the property in question is a share of the income of residue.

Spens K.C. and *Evershed* for the second appellant, besides adopting the above arguments, contended that there was no ground for applying Part II. of the First Schedule at all, as there was a sufficient indication in the will of an intention to vary the statutory order of application of assets. The use of the word "remainder" in the direction to collect the income of the remainder of the estate and pay 75 per cent. of the income to Mrs. Holt during her life, shows that it is only 75 per cent. of the income of what is left after paying funeral and testamentary expenses and debts that is intended to be bequeathed to Mrs. Holt. The case is in this respect exactly like *In re Kempthorne.* (2)

[LORD HANWORTH M.R. If the will was drafted with the intention of allowing the statutory provision as to payment of expenses and debts to take effect, could it have been more happily worded ?]

The direction to create a residue presupposes the payment of debts and liabilities. It is contended that there is a sufficient indication of an intention to exclude the statutory provision. There is an express direction to form a fund to answer possible calls on shares and to pay estate duty on gifts made less than three years before death, and this is followed by a direction to collect the "remainder."

But if the First Schedule applies, the various headings in Part II. of the Schedule describing property of the deceased

(1) [1929] 1 Ch. 722.

(2) [1930] 1 Ch. 268.

are, it is suggested, mutually exclusive. This is shown by considering the items in a reverse order, when it is seen that all down to paras. 2 and 1 refer to different parts of the deceased's estate. The property in question here clearly falls within para. 2, and it is only because of the doctrine of lapse that it is sought to bring it within para. 1. As however it falls within para. 2 it should be treated as excluded from para. 1.

Norman Daynes for the two infirmaries was not called upon.

Allan Walmsley for the plaintiff.

LORD HANWORTH M.R. So far as the first appeal is concerned, which was argued by Mr. Grant, I would really be content to leave the matter to Clauson J.'s judgment and say simply that I agree with him; but in deference to the energetic argument of Mr. Grant I will add a few words.

The testator died on March 12, 1929, having made his will dated February 2, 1929, which was proved on July 4 of the same year. The terms of the will have been read and I need only refer to the last clause, which is as follows: "I direct my executors to collect the income from the remainder of my estate and to pay 75 per cent. of it to my sister Mrs. Holt . . . . during her life and on her death the income of the whole of the estate to be invested for the benefit of the children of my two nieces Monica Holt and Alice Tong in equal shares on attaining the ages of twenty-one." This was followed by a gift over to two infirmaries if there were no children.

It seems that neither Monica Holt nor Alice Tong is married, so that the event of their having children has not arisen; but as the gift was only to take effect on the death of Mrs. Holt this only affects the future. But the immediate gift to Mrs. Holt of 75 per cent. of the income is rendered null and void under s. 15 of the Wills Act, because her husband witnessed the testator's signature to the will. The result of the bequest to Mrs. Holt being null and void is to make it necessary that this part of the income should be dealt with as on an intestacy during her life.

The Administration of Estates Act, 1925, has introduced considerable alterations of the law. Part III. relates to the administration of assets, and s. 32, sub-s. 1, provides: "The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities. . . . ." Mr. Grant's first contention is that this income which has to be dealt with as on an intestacy is not a part of the property of the deceased contemplated in s. 32. He says that the residue really arises from the executors realizing the property of the deceased, and after making certain payments out of the proceeds, investing the remainder in proper securities, and that it is the income to be derived from the corpus so ascertained that falls to be considered in this case. And Mr. Grant argues that this income is something which was not in being in the lifetime of the testator but arose after the estate was no longer his, and that it therefore ought to be treated as something in marked contradistinction to the property of the deceased. I am unable to agree with that view. Sect. 32 deals with the real and personal estate of a deceased person, and I pause to consider the meaning of "property" as defined in s. 55, sub-s. 1 (xvii.), of the Act, which provides: "'Property' includes a thing in action and any interest in real or personal property." Property passing to an executor may have, and in most cases has, the quality of producing income. Clauson J. refers in his judgment to live stock producing progeny, an example of assets by increase, as showing that income is not something independent of the property producing it but is the result of an integral quality belonging to many classes of property and included in the definition of property in s. 55, sub-s. 1 (xvii.). That being so, it would seem that this income, the bequest of which was ineffective, is a part of the estate of the testator. Further, it is to be dealt with as on an intestacy. What then does that mean? It means that the personal representative is to deal with it on the supposition that there was no testamentary disposition of it at all. That is the effect of the Wills Act, which by s. 15 makes the bequest null and void and therefore leaves the income to be dealt with as on an intestacy.

The Administration of Estates Act, 1925, s. 34, sub-s. 3, provides: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act." Part II. of the First Schedule gives a table fixing the order to be followed in the application of assets, when, as here, the estate is solvent. The first paragraph provides for the application of "Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies." I have already dealt with the meaning of "property of the deceased" which in my opinion includes income of residue. It is noticeable, however, when we come to this table that all the first four paragraphs open with the words "property of the deceased." That reinforces the view I have already expressed that the expression "property of the deceased" is to be given a wide significance and to be taken as including all that passes to the executors.

This leaves for consideration the contention that para. 1 of Part II. does not apply to the share of income of residue, because the residue is referred to in the will with the intention of disposing of it so that the income is not undisposed of within the meaning of the paragraph. Mr. Grant argues that para. 1 is intended to describe property which by the mistake of the testator was not dealt with by his will, as, for instance, where a testator is possessed of real estate and he makes a will relating to personalty only so that it is ineffective to deal with the portion of his property consisting of realty. In my

C. A.
1930
TONG,
In re.
HILTON
v.
BRADBURY.
Lord Hanworth M.R.

opinion it is impossible to give so narrow an interpretation to the words "undisposed of by will."

Eve J. in *In re Lamb* (1) said that he was unable to accept the view that these words must be referred to "property to dispose of which no attempt has been made by the will and ought not to be read as including a share of residue which has lapsed by reason of the legatee's death in the lifetime of the testator." He says: "The language is plain and unambiguous—a lapsed share of residue is properly described as property undisposed of by will." In *In re Kempthorne* (2) the Court of Appeal reserved that point for further consideration. My own view was that it was not material and that it would be mischievous to say something which would be merely obiter. But I had little doubt that I shared Eve J.'s view. I was of opinion that it would not be wise in dealing with these Acts relating to the law of property to attempt to solve matters of construction not before us for immediate determination. I adhere to the view which has often been expressed that it is wiser to deal with points only as they arise. On the question of what is meant by the words "undisposed of by will" I am satisfied to say that I agree with Eve J.'s decision in *In re Lamb.* (1) I cannot find any such distinction as has been suggested by Mr. Grant. A case where property has been left out of his will by a testator through forgetfulness is in my view in pari materia with a case where the testator attempts to dispose of it and his disposition is rendered null and void by the Wills Act. It would be going back on the provision of the Wills Act making the disposition null and void to say that there had been a disposition, although it was ineffective. The fact that a disposition is null and void connotes that the property attempted to be dealt with is undisposed of. It follows that para. 1 of Part II. of the First Schedule to the Administration of Estates Act, 1925, is apt to cover the income of residue under consideration in the present case. So far I have dealt with the points raised by Mr. Grant in his appeal, and I definitely adhere to Eve J.'s decision in *In re Lamb.* (1)

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(1) [1929] 1 Ch. 722.

(2) [1930] 1 Ch. 268.

By way of cross-appeal the same points are taken by Mr. Spens, and in addition he says this case falls within *In re Kempthorne* (1), as there are indications in the testator's will of a contrary intention preventing the statutory table of application of assets from operating. The words in the will that he is relying on are: "I direct my executors to collect the income from the remainder of my estate"; and he says that the word "remainder" must mean what is left after the funeral and testamentary expenses, debts and legacies have been paid. I am unable to accept that argument. It is quite clear that the testator directed the payment of legacies free of duty and that any duty that might contingently become payable on any gifts he might make before his decease should be paid out of his estate. He also authorized the executors to make provision for any possible calls on shares with an uncalled liability. These are specific duties imposed on the executors. It appears to me that the rule of expressio unius exclusio alterius must apply and that we cannot treat the word "remainder" as an indication that not only the specified duties and liabilities but also all other duties, expenses and liabilities were to be paid out of residue. In my view it is much easier to construe the will in conjunction with the statutory table. The will was made after the date when the Administration of Estates Act, 1925, came into force and any one drawing the will would know the rules as to the application of assets which would apply, if some other mode of paying the expenses and liabilities was not expressly introduced in the will. There are express directions as to some matters. Is it not the fair inference that he intended the statutory table to be followed in regard to the payment of other expenses, debts or liabilities? I cannot accept the view that there is any indication in the words used in the will that the statutory order of application of assets was not to apply in regard to these other matters. It follows that *In re Kempthorne* (1) does not apply and that we cannot treat the will as making any variation in the statutory order of application of assets, except in regard to estate duty.

Both appeals must be dismissed.

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(1) [1930] 1 Ch. 268.

ROMER L.J. I agree. By s. 34, sub-s. 2, of the Administration of Estates Act, 1925, it is provided that where the estate of a deceased person is solvent his real and personal estate shall be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities in the order mentioned in Part II. of the First Schedule. When I turn to this Part I find that after certain paragraphs dealing with the order of application of assets when an estate is solvent, it is provided that this order of application may be varied by the testator. The first question then is whether the testator has by his will varied the order of application of assets specified in Part II. It is true that the testator directed his executors to make provision for any possible calls on shares, that is to say, for a contingent liability and also to pay certain duties; but I fail to find anything in the will amounting to an indication of the testator's intention that the funeral and testamentary expenses and debts generally should be paid in any other mode than that specified in Part II. of the First Schedule. Even if the testator had directed his executors to pay all his funeral and testamentary expenses and debts and then given the remainder of his estate on certain trusts, I should still have hesitated to say that this amounted to an indication that the expenses and debts were to be paid in any other order out of the assets than that provided for in the First Schedule. The truth of the matter is that there is nothing in this Act which prevents or is intended to prevent executors from paying expenses, debts and liabilities out of the first assets coming to their hands available for the purpose; and Part II. of the First Schedule really only deals with the ultimate adjustment of the burden as between the parties becoming entitled to the testator's estate. Therefore the use of such a word as "remainder" does not seem to me to make any difference. Such words throw no light on how as between the persons having beneficial interests in the remainder the liability for expenses and debts is to be apportioned. On this point I agree with the learned judge.

The next question is whether in the events which have happened the income of a share of residue ineffectually given to Mrs. Holt during her life is "property of the deceased undisposed of by will." It is said that the words "undisposed of by will" mean property which the deceased has not attempted to dispose of by will. This is in my view an untenable argument. Obviously the words must include property not effectually disposed of by will. That is the natural meaning of the words, and that this meaning should be given to them is clear from para. 6 of Part II. of the First Schedule, which refers to "property specifically devised or bequeathed." That must mean property effectively, not ineffectively, disposed of.

The remaining question is, what is the meaning of "property of the deceased"? It is said that if a testator disposes of the whole of his estate, giving his residuary estate to executors upon trust for A., B. and C., and A., B. and C. all die in the lifetime of the testator, the residue is not property of the testator undisposed of by his will but is property of the executors. By s. 55, sub-s. 1 (xvii.), of the Administration of Estates Act, 1925, "property" is defined as including "any interest in real or personal property." Therefore we must read para. 1 of Part II. of the First Schedule as meaning any interest in property of the deceased undisposed of by will. This disposes of the argument that residue given to executors upon trusts which fail is not property undisposed of by the testator's will. The testator has caused the whole legal estate in his property to vest in executors, but in the case I have mentioned he has not in the events which happened disposed of the equitable interest, and that is just as much property as the legal estate. It follows that the property in the residue would not be disposed of and would fall within para. 1 of Part II. of the First Schedule.

Then it is said that this may very well be so as regards the corpus of residue or of a share of residue, but that what the testator here failed to dispose of was income. I would point out that all this amounts to is that in the present case the testator has disposed of the legal estate and part of the equitable interest but not of the whole equitable interest, and the part not effectively disposed of is property undisposed of by will.

I have made these observations out of deference to the arguments of Mr. Grant and Mr. Spens. Otherwise I should have contented myself with saying that I agreed with Clauson J. and with the decision of Eve J. in *In re Lamb.* (1)

EVE J. I also agree. Three questions arise. The first, Does the income of a testator's residuary estate or of so much of his residuary estate as is settled constitute property of the testator inasmuch as it accrues after his death ? What would the position of Mrs. Holt have been if she had been able to enjoy the interest bequeathed to her ? She would have been the equitable tenant for life of three-fourths of the testator's residuary estate ; and when the residuary estate vested in the executors virtute officii or as trustees of a trust estate, it remained property of the testator's estate and not property of the executors or trustees. In my opinion it is impossible to differentiate between the produce of an estate and the corpus of an estate as it existed at the testator's death even if the estate has since been converted and is invested in something different from the property, as it then existed. I think the decision of Clauson J. that the income constituted part of the property of the testator is undoubtedly right.

Then it is said the further question arises whether this interest can properly be described as property of the deceased "undisposed of by will." Unless one is compelled to put an artificial meaning on language, I cannot myself comprehend why it is not. It is clearly undisposed of by the testator's will. I adhere to what I said in *In re Lamb* (1) as to the wholly unambiguous language used in para. 1 of Part II. of the First Schedule to the Administration of Estates Act, 1925.

The next question is : Does Part II. of the First Schedule apply in this particular case, or has the testator pursuant to

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(1) [1929] 1 Ch. 722.

C. A.
1930
TONG, *In re.*
HILTON *v.* BRADBURY.
Eve J.

para. 8 (*a*) in Part II. determined or directed by his will that the order of application of assets should be varied ? Mr. Spens says that the testator has done so and that if the will be examined indications will be found that the statutory order of application is not to apply. That the testator contemplated that certain payments should be made otherwise than as provided in the Schedule is clear. He directed first that special provision should be made for certain contingent liabilities on shares not fully paid up, and then he assumed liability for any duty on gifts made by him within three years before his death, and having provided for the payment of that duty out of his estate goes on to direct that all legacies are to be paid free of duty. He then gives a number of legacies and annuities which would have to be provided for before the remainder could be ascertained in which Mrs. Holt was to be interested. I cannot help thinking that by indicating certain respects in which the statutory order of application of assets was to be departed from, the testator indicated clearly that except in respect of the payment of these particular liabilities the scheduled order of application was to be adhered to. The construction which Clauson J. placed on the will in this respect was in my opinion correct.

Lastly, Mr. Spens said that if we read Part II. of the Schedule upside down, we shall find grounds for supporting a contention he was about to make that the various kinds of property therein mentioned are mutually exclusive, and that as in that way we should arrive at para. 2 before para. 1 and find something in para. 2 which applies in this particular case, it would be unnecessary to go further. I know no authority for reading a Schedule prescribing the order in which assets are to be applied in payment of expenses and debts backwards for the purpose of justifying a reversal of that order. To my mind if we read the paragraphs in the order in which they are set out, we shall find something in para. 1 which is applicable to this case, and having found in para. 1 assets primarily liable for paying expenses and debts, it becomes unnecessary to read the Schedule further.

C. A.
1930
TONG,
In re.
HILTON
v.
BRADBURY.

I agree with the other members of the Court that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Richardson Sowerby, Holden & Co.; Pritchard, Englefield & Co., for Butcher & Barlow, Bury; Kinch & Richardson, for Hayward & Son, Leigh, Lancs; Winder & Holden.*

H. C. G.

LUXMOORE
J.
1930
Oct. 16.

In re VANDER BYL.

FLADGATE *v.* GORE.

[1930. B. 2091.]

Will—Settlement of Residuary Gift—Power of Appointment—Trust for Next of kin in Default of Appointment—Will of Donee of Power—Residuary Bequest—Failure of Gift—Husband of Residuary Legatee witnessing Will —Exercise of Power—Intention of Donee of Power—Blended Fund—Statutes of Distribution—Wills Act, 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *ss.* 15, 27—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 46, 50.

Under the will of a testator who died in 1890, A. V. B. had a general testamentary power of appointment over a share of his residuary trust estate. There was a provision that in default of appointment the unappointed share should be held in trust for the persons who at the death of A. V. B. would be entitled under the Statutes of Distribution. A. V. B. by her will appointed her sister I. C. G. her executrix and directed that all her debts and funeral expenses should be paid and after giving certain pecuniary legacies she gave " all the remainder of my property to my sister, I.C.G., to be disposed of as she thinks fit at her death." A. V. B. died a spinster in February, 1929, but, as the husband of I. C. G. had witnessed the will, the residuary gift could not take effect.

Doubts having arisen whether A. V. B. had effectually exercised the general power of appointment given her by the will of the testator:—

Held, that the testatrix had shewn an intention of taking the property subject to the power of appointment out of the instrument creating the power by treating it as forming one mass with her own property It passed therefore as if she had died intestate in respect of it and went to the persons entitled according to the Administration of Estates Act, 1925.

In re Davies' Trusts (1871) L. R. 13 Eq. 163 discussed and distinguished

LUXMOORE J.
1930
VANDER BYL, *In re.*
FLADGATE *v.* GORE.

ORIGINATING SUMMONS.

By his will dated September 11, 1889, Pieter G. Vander Byl after appointing certain persons therein named to be his executors and trustees and after devising his freehold property at Cannes, France to his trustees for the benefit of his wife and unmarried daughters and giving certain directions to his trustees further directed that from and after the death or second marriage of his wife the said property should fall into and form part of his residuary trust estate.

The testator also bequeathed to his trustees a legacy of 5000*l.* on trust for his wife for life and after her death upon trust for all his children by his late or then present wife as therein mentioned, he also gave a further legacy of 8000*l.* upon trust to divide the same into equal shares between his children by his first wife who should survive him with a provision as to the share of a daughter Euphemia C. Lady Heath as therein mentioned.

The testator then gave devised and bequeathed unto his trustees all the rest and residue of his estate whatsoever or wheresoever situate upon trust for sale and conversion and after payment thereout (inter alia) of the two legacies of 5000*l.* and 8000*l.* upon trust for investment and to stand possessed of the said trust moneys or the stocks funds and securities representing the same (thereinafter called his residuary trust estate) upon trust for all his children by either his first or second wife as therein mentioned in equal shares. And the testator declared that the share of each daughter of his (other than his daughter Euphemia C. Lady Heath) in his residuary trust estate and in the said two legacies should be held by his trustees upon trust to pay the annual income thereof to such daughter during her life for her separate use without power of alienation and immediately after the decease of the daughter her share and the annual income thereof should be held in trust for all or any one or more exclusively of her children and remoter issue generally in such manner as she should as therein mentioned by deed or will appoint but no child in whose favour an appointment should be made should participate under the trust next thereinafter contained in the unappointed portion of the settled fund without bringing the benefit of such appointment into hotchpot. And in default of appointment and subject to any partial appointment in trust for the child if only one or all the children if more than one as therein mentioned the children if more than one to take in equal shares but if there should be no such child then "in trust for such persons for such interests and generally in such manner in all respects as such daughter whether covert or sole shall by will appoint And in default of appointment and subject to any partial appointment in trust for the person or persons who at the decease of such daughter would have been entitled thereto under the Statutes for the distribution of intestates effects if she had died a widow domiciled in England and intestate such persons if more than one to take in the proportions prescribed by the same Statutes."

The testator died on March 9, 1890, and probate was granted by the Principal Probate Registry on July 22, 1890.

The testator was twice married, his second wife being still living and residing at the property at Cannes. There were four children of the testator's first marriage—namely: (*a*) Euphemia Celina Lady Heath, who died on August 21, 1921, leaving an only child, the defendant Hylda M. Bates. (*b*) Pieter G. V. Vander Byl, who died on November 7, 1921, leaving issue three children—namely, the defendants Aimee Irene Vander Byl, Voltelin St. John Vander Byl and Fleming V. Vander Byl. (*c*) The defendant Isabel Charlotte Lady Gore. (*d*) Aimee E. Vander Byl.

There were four children of the testator's second marriage—namely, the defendants Anna H. M. Mussa, John Vander Byl, Albert M. Vander Byl and Yvonne A. de Clermont. All attained the age of twenty-one years.

By her will dated December 1, 1927, the above mentioned Aimee E. Vander Byl, after appointing her sister Lady Gore executrix, directed that all her debts and funeral expenses should be paid as soon as conveniently might be after her death and after making certain pecuniary bequests to two of her nephews, a niece and her half-sister Anna Mussa, gave "all the remainder of my property to my sister Isabella Charlotte Gore to be disposed of as she thinks fit at her death." The testatrix died a spinster on February 15, 1929, and her will was duly proved by the defendant Isabel C. Lady Gore on June 6, 1929.

The will of Aimee E. Vander Byl was witnessed by the husband of the residuary legatee, the defendant Isabel Charlotte Lady Gore, and the residuary gift therefore was rendered invalid by reason of the Wills Act, 1837, s. 15.

The surviving trustees of the will of the testator Pieter G. Vander Byl took out an originating summons for the determination (inter alia) of the question whether the testatrix Aimee E. Vander Byl (*a*) effectually executed the general testamentary power of appointment exercisable by her in the events which happened over the legacies and share of the residuary trust estate of Pieter G. Vander Byl settled upon trust for herself for life with remainders over so as to make the legacies and share part of her own estate for all purposes or (*b*) executed such power to a limited and if so what extent only or whether the said legacies and share devolved as in default of appointment.

C. R. R. Romer for the plaintiffs. [He referred to *In re Sutcliffe.* (1)]

R. H. Hodge for the defendant Isabel C. Lady Gore. Under the will of the testatrix Aimee E. Vander Byl this defendant had the property for all purposes, and as on the death of the testatrix the residue of her estate was undisposed of it passed to her sister of the whole blood under the Administration of Estates Act, 1925.

With regard to the testatrix exercising the power of appointment given her by the will of Pieter G. Vander Byl, the intention of the donee of the power has to be regarded: Farwell on Powers, 3rd ed., p. 268. The gift in the testatrix's will of her residuary estate operated as an execution of the power. The estate was described in a general manner,

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(1) [1929] 1 Ch. 123.

Wills Act, 1837, s. 27, and see Jarman on Wills, 7th ed., pp. 780 et seq.

The disposition of the testatrix really comes within the case of *In re Davies' Trusts* (1); and see *In re Ickeringill's Estate.* (2)

J. F. W. Galbraith K.C. and *A. P. Vanneck* for Aimee I. Vander Byl, Voltelin St. John Vander Byl, and Fleming V. Vander Byl. The interest of these defendants is the same as that of the defendant Isabel C. Lady Gore. It is submitted, however, that the testatrix has made her own property and the property of the testator over which she had a power of appointment one blended fund, she has in effect massed the two together: *In re Dumble.* (3) Here the appointed property and the testatrix's own assets had to go in one way: *Williams* v. *Williams.* (4) The indication is clear that she intended the property to be massed together.

[LUXMOORE J. referred to *In re Seabrook.* (5)]

In that case there was no residuary gift. *In re Davies' Trusts* (1) can be distinguished from the one before the Court. The principle is accurately stated in Farwell on Powers 3rd ed., p. 270.

[They referred to *In re Boyd.* (6)]

T. A. C. Burgess for the defendant Hylda M. Bates.

A. G. Coulson (*G. D. Johnston* with him) for the defendants Anna H. M. Mussa, John Vander Byl, and Albert M. Vander Byl. The power was not exercised by the testatrix for all purposes. The case of *In re Davies' Trusts* (1) is relied on; that case was followed in *In re Russell Skinner* (7), and see *In re Marten* (8), where *In re Davies' Trusts* (1) is dealt with.

[LUXMOORE J. The test seems to depend on whether the testatrix had massed all the property together into one estate.]

J. Neville Gray for the defendant Mrs. Yvonne A. de Clermont. There is not sufficient indication here to show

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(1) (1871) L. R. 13 Eq. 163.

(2) (1881) 17 Ch. D. 151, 156.

(3) (1883) 23 Ch. D. 360, 369.

(4) [1900] 1 Ch. 152, 155.

(5) [1911] 1 Ch. 151.

(6) [1897] 2 Ch. 232.

(7) [1924] W. N. 65.

(8) [1902] 1 Ch. 314, 324.

LUXMOORE J.
1930
VANDER BYL, *In re.*
FLADGATE *v.* GORE.

that the testatrix has made one blended fund and one has to find an intention: *In re Boyd* (1), *Williams* v. *Williams* (2) turned on a different point. There is nothing in the testatrix's will to show that she had the power of appointment in her mind at all. *In re Davies' Trusts* (3) is relied on. (4)

LUXMOORE J. The question which I have to determine in this case is whether the late Aimee Ernestine Vander Byl effectually exercised the general testamentary power of appointment which she had under her father's will so as to make the subject-matter of that general testamentary power of appointment her own property and go with the rest of her own estate.

By s. 27 of the Wills Act, 1837, the general bequest of property by a testator includes property over which he has a general power of appointment, so that the property is included under the will. The gift of the remainder of her property which the testatrix made in favour of her sister Lady Gore has failed by reason of the fact that the sister's husband was one of the attesting witnesses to the will. Sect. 15 of the Wills Act, 1837, makes that an invalid disposition of the property and to that extent there is a failure of her testamentary disposition and an intestacy. The question therefore arises whether the property which is subject to the general power of appointment passes as part of the property of the testatrix or passes under the will of her father Pieter G. Vander Byl as not having been taken out of the trusts thereby declared.

The question that always arises in cases of this kind is whether the person purporting to exercise the power has intended by the exercise of the power to take the appointed property out of the instrument creating the power for all purposes or only for the limited purpose of giving effect to the disposition which has been made. There are many

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(1) [1897] 2 Ch. 232, 237.

(2) [1900] 1 Ch. 152, 156.

(3) (1871) L. R. 13 Eq. 163.

(4) [The possible effect of s. 52 of the Administration of Estates Act, 1925, was not discussed in the argument—F.P.]

LUXMOORE J.
1930
VANDER BYL, *In re.*
FLADGATE *v.* GORE.

authorities relating to this question but, as is pointed out in Farwell on Powers, there are certain rules which guide the Court in discovering the intention of the person who is said to have exercised the power. The rules are stated in the 3rd ed. of Farwell on Powers, pp. 269 and 270. I need not refer to the first or second of those rules but the third is important for the purposes of this case. It is stated in these terms: "If there be an appointment to A., who dies before the testator" (i.e., the person making the appointment) "no inference can be drawn from the mere appointment by itself of an intention to make the property the testator's own for all purposes." The well known case of *In re Davies' Trusts* (1) is referred to for that proposition. The statement of the rule proceeds: "But there may be other *indicia*, such as treating the appointed fund and the testator's own property as one mass and charging the entirety with debts and expenses and appointing executors, which will enable the Court so to hold." It is worthy of note that in the case of *In re Davies' Trusts* (1) the executrix by the will in question declared that all her just debts, funeral and testamentary expenses should be paid and discharged. She then gave pecuniary legacies and bequeathed "all the rest, residue, and remainder of my moneys in the funds . . . ."—that is what remained of her own property after the debts, funeral and testamentary expenses had been paid out of it. The bequest then proceeded in these words: "and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed, or have any title to or interest in, unto"—the beneficiaries. It is plain that she was dealing with her own property and the property which was the subject of the power as two quite separate things. There was no massing of the two classes of property together so as to make them equally liable for the payment of the debts, funeral and testamentary expenses and legacies. If there had been the decision would have been the other way. That this is the distinguishing feature of the decision in *In re Davies' Trusts* (1) has been pointed out

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(1) (1871) L. R. 13 Eq. 163.

LUXMOORE J.
1930
VANDER BYL, *In re.*
FLADGATE *v.* GORE.

in many of the subsequent cases. I think it is perhaps most clearly stated by Romer L.J. in the case of *In re Marten* (1) to which I was referred.

In my judgment the case before me does not fall within the decision of *In re Davies' Trusts* (2) at all. No one suggests and I certainly would not dream of suggesting that *In re Davies' Trusts* (2) was incorrect in any way, I agree with every word of the decision; but this case is quite different. Here the testatrix has dealt with the whole of her property as one mass, including in it by reason of s. 27 of the Wills Act, 1837, the property which was subject to the general power of appointment, she has not distinguished between her own property and that subject to the general power in any way. The debts, funeral expenses and legacies are all to be paid out of a combined mass. There is no priority of one part of the estate and no liability of one part of the estate coming before any other part of the estate. In my judgment the testatrix has made both the property subject to the power and her own property one mass for the whole purpose of payment of her debts and funeral expenses and legacies and consequently for all the purposes of her will.

In the circumstances I am satisfied that she has, on the true construction of her will, shewn a clear intention of taking the property subject to the general power of appointment out of the instrument creating that power and making it her own, so that in the events that have happened it passes as if it had been her property and she had died intestate in respect of it. That is it goes to her next of kin to be ascertained according to the provisions of the Administration of Estates Act, 1925.

Solicitors: *Fladgate & Co.; Radcliffes & Hood, St. Barbe Sladen & Wing; Holloway, Blount & Duke; Maples, Teesdale & Co.*

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(1) [1902] 1 Ch. 314, 324.

(2) (1871) L. R. 13 Eq. 163.

A. R. T.

FARWELL J.

1930

Nov. 17, 18, 19.

CHATSWORTH ESTATES COMPANY *v.* FEWELL.

[1929. C. 1805.]

Covenant—Restrictive Covenant—Houses to be used as private Dwelling-houses—Purchaser with Notice—Change in Character of Neighbourhood—Plaintiffs' Acts and Omissions—Estoppel.

In an action to enforce restrictive covenants against a purchaser with notice, bound only in equity, the defendant relied on two equitable defences—namely :—

(*a*) A general change in the character of the neighbourhood ;

(*b*) An allegation that this change was brought about by the acts or omissions of the plaintiffs or their predecessors :—

Held (*a*) In order to succeed on the first ground the defendant must show so complete a change in the character of the neighbourhood as to render the covenants valueless to the plaintiffs, so that an action to enforce them would be unmeritorious, not bona fide, and merely brought for some ulterior purpose.

(*b*) In order to succeed on the second ground the defendant must make out a sort of estoppel by showing that the plaintiffs' acts and omissions were such as to justify a reasonable person in believing that the covenants were no longer enforceable.

In order to keep their estate purely residential the plaintiffs' predecessors had imposed covenants preventing any house being used "otherwise than as a private dwelling-house." They or the plaintiffs had however licensed a number of schools, some blocks of flats, a hotel, and, in certain exceptional circumstances, three boarding houses, and without the plaintiffs' knowledge about half a dozen other boarding houses were being carried on in the area, which however still remained mainly residential.

Held, that these acts and omissions did not prevent the plaintiffs from restraining the defendant from using his house as a guest house.

WITNESS ACTION.

By a conveyance on sale dated November 2, 1897, and made between the plaintiffs' predecessor in title (hereinafter called "the vendor"), of the one part and the defendant's predecessor in title (hereinafter called "the purchaser") of the other part, the vendor conveyed a house now called Bella Vista at the corner of Silverdale Road and Granville Road, Eastbourne, and an adjoining piece of land to the purchaser in fee simple.

The purchaser for himself and the persons for the time being entitled to the hereditaments thereby conveyed or any part thereof covenanted with the vendor and the owner or owners for the time being of Compton Place, Eastbourne, then belonging to the vendor, that he the purchaser or such person or persons entitled as aforesaid would not without the previous written consent of the vendor or the owner or owners for the time being of Compton Place or his or their agent use Bella Vista as a school or for any educational purpose or as a public house or beer-shop or for any trade or business or "otherwise than as a private dwelling-house" and also would not do or permit to be done thereon any act or thing whatsoever which might be or become a nuisance, annoyance or injury to any land of the vendor adjoining or near thereto or to the tenants of that land or any act or thing which might tend to deteriorate the value of that land.

The Chatsworth Estates Company bought the Compton Place property on November 3, 1926, but their conveyance not being completed their immediate vendor, who obtained his title on April 5, 1924, was joined as co-plaintiff.

In November, 1927, the defendant bought Bella Vista with notice of these covenants. He went into occupation in April, 1928, and at once started taking paying guests. His house was extremely well managed, and there was no advertisement inside or out to indicate that it was not used as a private dwelling-house.

On June 6, 1928, the plaintiffs having heard of this user, drew attention to the covenant. On September 25 the defendant pointed out that the whole character of the neighbourhood had changed, but, without prejudice to that point, asked for a licence, which the plaintiffs, after careful consideration, refused on October 13.

On October 17 the defendant suggested that the covenants could be modified under s. 84 of the Law of Property Act, 1925 (15 Geo. 5, c. 20). On October 23 the plaintiffs replied that they were instructed to issue a writ, but would hold their hands for a few days, so that the defendant could let them know whether he proposed to apply for a modification under s. 84. The defendant however did nothing, and on June 4, 1929, the plaintiffs commenced this action for an injunction or damages.

On January 13, 1930, the defendant asked to have the matter determined under s. 84, but on January 17 the plaintiffs pointed out that he had lost his opportunity and the action must go on.

The defendant admitted the breach of covenant, but contended that the covenants of 1897 were not now enforceable for two reasons. First, by reason of the change in the general character of the neighbourhood, whereby the object of those covenants had completely disappeared. Secondly, by reason of the fact that this change had been brought about by the acts and omissions of the plaintiffs and their predecessors in title.

It appeared that numerous high class schools, some blocks of flats, a hotel, and, in certain exceptional circumstances, three boarding houses had been licensed in the area, and there were about half a dozen other boarding houses or guest houses, of which the plaintiffs only recently became aware, and as to which they stayed their hands until this action was decided. Their estate extended from Compton Place to the sea front.

Gavin Simonds K.C. and *Cecil Turner* for the plaintiffs. The defendant admits that he had notice of the covenants, and that, if enforceable, the plaintiffs are entitled to enforce them. He relies first on the general change in the character of the neighbourhood, and secondly on an allegation that that change was brought about by the acts or omissions of the plaintiffs or their predecessors, and says it is therefore inequitable to enforce the covenants against him. The onus is clearly on the defendant.

Leonard Stone for the defendant. There is a great change in the character of the neighbourhood. There are so many schools, flats and licensed or unlicensed boarding houses already there that it would be inequitable to restrain me from carrying on my high-class guest house.

[FARWELL J. The area is still mainly residential. Can I refuse an injunction because you are breaking the covenants in a high-class manner ?]

You could put me under any undertakings that the plaintiffs desired to keep up the character of my guest house, but having regard to the change in the neighbourhood, you ought not to restrain me altogether: *Duke of Bedford* v. *British Museum Trustees* (1); *Roper* v. *Williams* (2); *Peek* v. *Matthews.* (3)

It was suggested in *Sayers* v. *Collyer* (4) that the change in the neighbourhood doctrine only applied where the change was due to the plaintiff's acts. But that suggestion was negatived in *Knight* v. *Simmonds* (5), following *German* v. *Chapman.* (6) In *Knight* v. *Simmonds* (5) the defendant failed, because the previous breaches were trivial and secret, and there had been no licence or acquiescence. Here we have licences, open breaches and secret breaches discoverable by proper diligence. My own business is quite unobjectionable.

[FARWELL J. Can I consider that? If I do not restrain your breach, will not the whole covenants go?: *Knight* v. *Simmonds.* (7)]

No. The covenants are severable, and you must consider the particular breach. I agree that if I am not restrained no one could hereafter be restrained from carrying on a high-class guest house. But he could not carry on a factory or public house: *Osborne* v. *Bradley.* (8)

The Court is entitled to consider the change in the neighbourhood irrespective of the plaintiffs' acts or omissions: *Sobey* v. *Sainsbury* (9), where Sargant J. took into account the change brought about by the acts of adjoining owners outside the district.

[FARWELL J. I need not consider whether that was right, but I doubt it.]

This is not the case of enforcing a legal covenant against the covenantor. It is a purely equitable remedy, and unless substantial damage is proved, the Court has full discretion to refuse an injunction: *Kelly* v. *Barrett* (1); *Achilli* v. *Tovell.* (2) This discretion has even been exercised in favour of the actual covenantor: *Sharp* v. *Harrison.* (3) I must admit that Tomlin J.'s dictum in *Kelly* v. *Barrett* (1) was not entirely accepted by the Court of Appeal. (4)

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(1) (1822) 2 My. & K. 552.

(2) (1822) T. & R. 18,22

(3) (1867) L. R. 3 Eq. 515, 519.

(4) (1884) 28 Ch. D. 103, 108, 110.

(5) [1896] 1 Ch. 653; 2 Ch. 294, 298.

(6) (1877) 7 Ch. D. 271, 279.

(7) [1896] 1 Ch. 653, 665.

(8) [1903] 2 Ch. 446, 456.

(9) [1913] 2 Ch. 513, 529.

Lastly, if the Court is against me I ask to have the injunction postponed till I can make an application under s. 84 of the Law of Property Act, 1925: *Feilden* v. *Byrne.* (5)

Gavin Simonds K.C. It is unnecessary here to consider whether in *Sobey* v. *Sainsbury* (6) Sargant J. went too far in considering the change in property outside the district.

[FARWELL J. I think he did. But the question here is whether the plaintiffs or their predecessors have so acted as to put the defendant to rest as regards these covenants. If he opens a shop can he rely on the fact that the plaintiffs have permitted flats ?]

No. If every relaxation amounts to a release in toto, no landowner could allow anything: *Blount* v. *Layard.* (7)

Again, what are our acts ? We have permitted schools and flats, but apart from three very exceptional cases we have not allowed boarding or guest houses. What are our omissions ? We do our best to keep up the covenants, but we are not detectives, and some half dozen boarding or guest houses have been quietly carried on without our knowledge. Our omission to discover those breaches cannot affect our right to restrain them, as we shall do if we succeed in this action.

We are not obliged to prove substantial damage: *Elliston* v. *Reacher.* (8) The defendant was given an opportunity of making an application under s. 84 before action. He elected not to do so, and has fought the action to the finish. The injunction should not be suspended.

Leonard Stone replied.

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(1) [1924] 2 Ch. 379, 397.

(2) [1927] 2 Ch. 243.

(3) [1922] 1 Ch. 502.

(4) [1924] 2 Ch. 404, 411.

(5) [1926] Ch. 620, 625.

(6) [1913] 2 Ch. 513, 529.

(7) [1891] 2 Ch. 681n, 691n, decided in 1888

(8) [1908] 2 Ch. 374, 395; affirmed 665.

FARWELL J.
1930
CHATSWORTH ESTATES Co. v. FEWELL.

FARWELL J. [after stating the facts and reading the covenants, which he thought were no doubt taken with the original intention of preserving the property in the vicinity of Compton Place as private dwelling-houses and as a purely residential area, continued:] The result of the evidence is that in my view the area in question still remains a residential area. In considering whether an area is residential or not there is a clear distinction between residential flats and boarding houses. The defendant contended that for this purpose there was no distinction and that a really well conducted paying guest house was just as residential as a block of flats. I cannot accept that view. A residential area means an area in which persons reside more or less permanently. A hotel or boarding-house area is quite different. This area remains mainly residential, although there are many flats, some few boarding-houses, some schools, and so on. Although the area is no longer confined to single dwelling-houses, and the covenants have been somewhat relaxed in the sense that some boarding-houses or guest houses have been permitted, and some other houses have been put to uses not strictly within the covenants, still, on the whole, and taking it broadly, the area still retains its character of being a residential area.

That does not, however, determine the question before me, because although a block of flats does not necessarily render the area non-residential, its erection, or the conversion of a house into a block of flats, is undoubtedly a technical breach of the covenants. In those circumstances I have to consider whether it would be equitable for me to give the plaintiffs any relief by injunction or damages, or whether I must refuse all relief.

Nothing can be said against the defendant's conduct of his establishment except that it is a breach of covenant. That being so ought I to refuse the plaintiffs relief ?

The defendant's first ground of defence is that there has been such a complete change in the character of the neighbourhood, apart from the plaintiffs' acts or omissions, that the covenants are now unenforceable. But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all. A man who has covenants for the protection of his property cannot be deprived of his rights thereunder merely by the acts or omissions of other persons unless those acts or omissions bring about such a state of affairs as to render the covenants valueless, so that an action to enforce them would be unmeritorious, not bona fide at all, and merely brought for some ulterior purposes. It is quite impossible here to say that there has been so complete a change in the character of this neighbourhood as to render the covenants valueless to the plaintiffs. Whether right or wrong the plaintiffs are bringing this action bona fide to protect their property, and it is hopeless to say that the change in the character of the neighbourhood is so complete that it would be useless for me to give them any relief.

The defendant really relied on the acts and omissions of the plaintiffs and their predecessors as a bar to equitable relief. Now the plaintiffs are not unduly insistent on the observance of these covenants in this sense, that they do not conduct inquisitorial examinations into their neighbours' lives, and do not make it their business to find out very carefully exactly what is being done, unless the matter is brought to their notice, either by complaints of other inhabitants, or by seeing some board or advertisement. I cannot think that plaintiffs lose their rights merely because they treat their neighbours with consideration. They are doing what they think sufficient to preserve the character of the neighbourhood. Whether they do enough is another matter, but I am quite satisfied that they are not intending, by their acts or omissions, to permit this area to be turned into anything other than a mainly residential area. There is no doubt however that they have permitted breaches of covenant in several cases where houses have been turned into flats, they have permitted at least four houses to be carried on as boarding-houses or hotels, and they have not prevented—in some cases because they did not know of them—some half a dozen other houses being used as boarding houses or guest houses.

There are still however a very large number of private dwelling-houses in the area, and I am satisfied that while the use of Bella Vista as a guest house or boarding house may not at the moment cause any actual damage to Compton Place or its owners, there is a prospect of damage in the future if the defendant is allowed to continue to use Bella Vista in that way, because it might well lead to many other houses being so used which would undoubtedly damnify the owners of Compton Place, especially if they develop the park and grounds as intended. In that way it will certainly be detrimental to the plaintiffs to permit Bella Vista to be used as a guest house. But whether they are entitled to relief depends on the exact effect of their past acts and omissions.

Now, as stated in many authorities, the principle upon which this equitable doctrine rests is that the plaintiffs are not entitled to relief if it would be inequitable to the defendant to grant it. In some of the cases it is said that the plaintiffs by their acts and omissions have impliedly waived performance of the covenants. In other cases it is said that the plaintiffs, having acquiesced in past breaches, cannot now enforce the covenants. It is in all cases a question of degree. It is in many ways analogous to the doctrine of estoppel, and I think it is a fair test to treat it in that way and ask, "Have the plaintiffs by their acts and omissions represented to the defendant that the covenants are no longer enforceable and that he is therefore entitled to use his house as a guest house?"

If treated in that way it gets rid of a difficulty that I felt during the defendant's argument. Would the plaintiffs' acquiescence in past breaches of covenants of one nature oblige the Court to refuse relief in the case of a breach of another nature? Suppose the defendant turned his house into a butcher's shop. Could he say, "The plaintiffs have permitted residential flats. They cannot therefore enforce any of the covenants against me"? The answer must be in the negative, because applying my test it could not I think be suggested that the plaintiffs by permitting houses to be turned into flats had represented to the defendant that he could use his house as a butcher's shop. The question is really this: What is it fair to say that the plaintiffs' acts and conduct entitled the defendant to assume as to his use of Bella Vista? Could the defendant reasonably say, "Having regard to the plaintiffs' acts and conduct they could not properly object to my using Bella Vista as I do"?

The answer in my judgment is in the negative. The plaintiffs' acts and omissions did not justify the defendant in thinking that he was entitled to break the covenants by using Bella Vista as a boarding house. It is true that the plaintiffs have sanctioned or permitted other breaches. Flats however stand on quite a different footing from other breaches. They do not render an area non-residential, and although technically a breach of the covenants I do not think that another householder would be justified in thinking that he was entitled to use his house for a business merely because the plaintiffs had permitted other houses to be converted into flats. I start on the footing that the site was originally intended to be a residential area. Therefore, in considering whether the defendant is justified, flats must be discounted.

There is then very little left. There are undoubtedly three permitted boarding houses and a hotel. [His Lordship explained the exceptional nature of these cases.] Other houses have been so used without the plaintiffs' knowledge, and since they have become aware of the user they have only stayed their hands because of this action.

On the whole I have come to the conclusion that it would be a denial of justice to the plaintiffs if I were to hold that they have so acted in the past as to disentitle them to relief for an undoubted breach of the covenants. Such a decision would render it extremely difficult for them in the future to prevent other persons carrying on guest houses. If I refused relief and another householder started a boarding house close to Bella Vista, and the plaintiffs sought to restrain him, they would be met with the answer: "Having regard to what the Court said the defendant could do at Bella Vista, it is hopeless to say that we cannot carry on a similar business on our property." I cannot believe that the Court is concerned to inquire into the exact way in which a particular business is carried on, and to discriminate between a boarding house so called and a house dignified by the name of guest house. For this purpose they are the same, and if I refused the plaintiffs relief there would be no means of preventing the area being converted into a boarding house area.

As to the form of relief I must grant an injunction. The relief sought is no doubt purely equitable, but I cannot accept the defendant's contention that I ought not to grant an injunction without proof of substantial damage. That is directly contrary to *Elliston* v. *Reacher*. (1) I need not read the familiar passage, but it clearly establishes that a plaintiff is entitled prima facie to an injunction, though only equitable rights are being enforced, and though there is not any proof of immediate and substantial damage, unless the plaintiff himself has done something to disentitle him to that form of relief.

This is peculiarly a case for an injunction. Whatever his previous knowledge, the defendant knew before the date of the writ, June 4, 1929, that he was breaking the covenant, and that the plaintiffs objected. In the face of that he elected to go on in assertion of his supposed legal right, to which I have held he is not entitled. In those circumstances I ought to give the plaintiffs the only substantial relief I can—namely, an injunction. Damages are no remedy, because the object of the covenant is not to make persons pay for committing breaches but to prevent those breaches.

The defendant suggests that I ought to suspend the operation of the injunction until he has had time to make an application under the Law of Property Act, 1925, s. 84. But though the plaintiffs expressed their willingness to such an application before action, the defendant elected not to make one. After action he suggested such an application,

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(1) [1908] 2 Ch. 374, 395; affirmed 665.

FARWELL J.
1930
CHATSWORTH ESTATES CO. v. FEWELL.

and I am not surprised that the plaintiffs refused. As the defendant elected not to make an application before action, but to wait and see whether the plaintiffs would really bring an action, I ought not to deprive the plaintiffs of the fruits of their victory by postponing the operation of the injunction for possibly a considerable period. The plaintiffs are entitled to an injunction with costs.

[By consent the injunction was suspended till January 10, 1931, so as not to interfere with Christmas arrangements.]

Solicitors: *Trollope, Winckworth, Crump & Sprott, for Currey & Co., Westminster; Field, Roscoe & Co., for Stapley & Hurst, Eastbourne.*

G. R. A.

BENNETT J.
1930
Oct. 31.

DELAVENNE *v.* BROADHURST.

[1930. D. 1932.]

Company—Private Company—Transfer of Shares—Power to transfer from one Member to another.

Certain shareholders in a private company commenced an action to restrain certain members of the company from transferring shares otherwise than in accordance with the articles of association. The substantial question (which came before the Court upon motion) was whether one member was entitled, under the articles, to transfer shares to another member.

The material articles were as follows:—

Article 5: "The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares, and clause 20 of Table A shall be modified accordingly. No shares shall in any circumstances be transferred to any infant, bankrupt, or person of unsound mind. Save as hereby otherwise provided, no share shall be transferred to any person who is not a member of the company so long as any member or failing such member any person selected by the directors is willing to purchase the same at the fair value which shall be determined as hereinafter provided."

Article 6: "In order to ascertain whether any member or person selected as aforesaid is willing to purchase a share at the fair value, the person whether a member of the company or not proposing to transfer the same (hereinafter called 'the retiring member') shall give notice in writing (hereinafter described as a 'sale notice') to the company that he desires to sell the same, and until otherwise determined by the company in general meeting the same shall be offered among the holders of ordinary shares in proportion as near as may be to their existing holdings thereof and any not accepted by them shall be offered to such other persons as the directors shall determine. Such notice shall constitute the company the agent of the retiring member for the sale of such shares to any member of the company or a person selected as aforesaid at the fair value. No sale notice shall be withdrawn except with the sanction of the directors" :—

Held, that there was nothing in the language of arts. 5 and 6 which gave rise to the necessity of implying any restriction upon the right of a member of the company to transfer shares therein to another member.

MOTION.

The defendant company, the Mechanical Copyright Protection Society, Ld., was incorporated as a private company in July, 1924, with a capital of 2400*l.*, divided into 2400 ordinary shares of 1*l.* each. Of these shares 1000 stood in the names of the defendants, A. V. Broadhurst and H. Smith, upon certain trusts. By an order of the Court, made on June 17, 1930, in another action, the defendants, A. V. Broadhurst and H. Smith, were ordered to sell the 1000 shares and to distribute the proceeds of sale in manner therein mentioned. The plaintiffs, as shareholders in the defendant company, being apprehensive lest the defendants, A. V. Broadhurst and H. Smith, should transfer the shares otherwise than in accordance with the articles of association of the company, commenced an action to restrain them from so doing. The question came before the Court upon motion, the substantial question being whether a transfer of shares from one member of the defendant company to another was prohibited by the articles.

The material articles were as follows :—

Article 5 : "The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares, and clause 20 of Table A shall be modified accordingly. No shares shall in any circumstances be transferred to any infant, bankrupt or person of unsound mind. Save as hereby otherwise provided no share shall be transferred to any person who is not a member of the company so long as any member or failing such member any person selected by the directors is willing to purchase the same at the fair value which shall be determined as hereinafter provided."

Article 6: "In order to ascertain whether any member or person selected as aforesaid is willing to purchase a share at the fair value the person whether a member of the company or not proposing to transfer the same (hereinafter called 'the retiring member') shall give notice in writing (hereinafter described as a 'sale notice') to the company that he desires to sell the same, and until otherwise determined by the company in general meeting the same shall be offered among the holders of ordinary shares in proportion as near as may be to their existing holdings thereof, and any not accepted by them shall be offered to such other persons as the directors shall determine. Such notice shall constitute the company the agent of the retiring member for the sale of such shares to any member of the company or a person selected as aforesaid at the fair value. No sale notice shall be withdrawn except with the sanction of the directors."

The application before the Court was: (*a*) that the defendants, A. V. Broadhurst and H. Smith, might be restrained by injunction from selling or parting with possession of or in any way dealing with all or any of the 1000 shares otherwise than in accordance with the defendant company's articles of association, and in particular otherwise than by giving notice in writing to the defendant company that they desire to sell the same so as to constitute the defendant company their agent for the sale thereof at the fair value in manner provided by the said articles relating to the transfer of shares; (*b*) that the defendant company and its officers might be restrained from accepting or registering any transfer or dealing with the shares until they had been dealt with according to the said articles of association.

Lionel Cohen K.C. and *H. E. Salt* for the plaintiffs. Articles 5 and 6 must be read together. The combined effect of these two articles is to impose a clear prohibition upon shareholders and prevent one member from transferring shares to another member.

Sir Gerald Hurst K.C. and *Charles Harman* for the defendant company and other defendants. The articles contain no words prohibiting a transfer from one member to another. It is incumbent upon the plaintiffs to find an express prohibition, and nothing less, under articles 5 and 6. Unless an express prohibition can be found in the articles of association the right of transfer is absolute, and the right of transfer includes a transfer from one member to another. The principle is stated in *In re Discoveries Finance Corporation, Ld.* (1).

[They also referred to *Weston's Case* (2) and to Buckley on the Companies Acts, 11th ed., p. 135.]

T. K. Wigan and *H. H. C. Graham* for other parties interested.

BENNETT J. [after stating the facts continued :] The question arises with respect to the 1000 shares standing in the names of the defendants, Broadhurst and Smith. The shares are held by them on certain trusts. An inquiry was directed by an order of Eve J. of June 17, 1930, as to the trusts affecting those 1000 shares, and an order was made directing those defendants to sell the shares and distribute the proceeds of sale. The plaintiffs, as shareholders of the defendant company, contend that the shares, which Eve J. has directed to be sold, are, under the articles of association, to be offered to all the members of the company at a fair value and in proportion to the shares which the members hold, and they contend that there is a prohibition imposed by the articles upon the person registered as the holder of the shares from transferring those shares, even to a member, until such an offer has been made. The question depends on the construction of articles 5 and 6 of the articles of association.

It is necessary in construing these articles to see whether they contain, either expressly or by necessary implication, the prohibition for which the plaintiffs contend. The principle governing a case like the present is to be found stated in the judgment of Buckley L.J., delivering the judgment of the Court of Appeal in *In re Discoveries Finance Corporation, Ld.* (1) in the following terms: "We propose first to state the principles as we understand them. By s. 22 of the Companies Act, 1862, which is reproduced as s. 22 of the Companies (Consolidation) Act, 1908, it is provided that the shares in a company under these Acts shall be capable of being transferred in manner provided by the regulations of the company. The regulations of the company may impose fetters upon the right of transfer. In the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody to any transferee, even though he be a man of straw, provided it is a bona fide transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares —that the transferor bona fide divests himself of all benefit. If authority be wanted for a proposition so familiar it is to be found in the language of Page Wood L.J. in *Weston's Case.*" (2)

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(1) [1910] 1 Ch. 312, 316.

(2) (1868) L. R. 4 Ch. 20, 28.

The plaintiffs and defendants agree that that is the principle which governs the rights of the parties to transfer these shares in this company.

Article 5 provides as follows: [His Lordship read article 5 and continued:] So far there is an absolute prohibition on a shareholder of the right to transfer a share to an infant, a bankrupt, or a person of unsound mind, and a prohibition against the transfer to any person who is not a member of the company so long as a member of the company or, failing any such member, a person selected by the directors is willing to take the shares. There is no express prohibition of the right of one member to transfer shares to another member. It is only as a matter of implication that such a prohibition can be read into the articles, and it is said that such a prohibition is to be implied from that which follows in article 6.

(1) [1910] 1 Ch. 312, 316. (2) L. R. 4 Ch. 20, 27.

BENNETT J.
1930
DELAVENNE v. BROADHURST.

Article 6 is in these terms: [His Lordship read article 6 and continued:] In my judgment article 6 is mere machinery for the purpose of enabling a member to transfer shares to some person who is not a member of the company. It is machinery for the purpose of ascertaining whether or not there is a member of the company who is willing to purchase at a fair value or a person selected by the directors who is willing to purchase at a fair value.

I am unable to find in that article anything which gives rise to the necessity of implying any restriction upon the right of a member of the company to transfer shares therein to another member.

In my judgment there is no basis for the contention put forward by the plaintiffs, and the motion fails and must be refused. The defendants' costs will be costs in the action.

Solicitors: *R. H. Behrend & Co.; Syrett & Sons; Rutland & Crauford; Golding, Hargrove & Golding.*

J. L. D.

C. A.
1930
BENNETT
J.
Feb. 13, 14,
18.

C. A.
July 8.

In re HOOD.

PUBLIC TRUSTEE *v.* HOOD.

[1929. H. 1145.]

Charity—Gift for spreading Christian Principles and extinguishing Drink Traffic—Principal and Ancillary Objects—Validity.

A testator, by his will dated in 1921, directed that certain persons who were, in effect, special trustees should hold his residuary estate upon terms which he expressed as follows: "Whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these principles and I therefore hope and trust that active steps will be taken to minimize and ultimately extinguish this enemy of my country's welfare. Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimize and extinguish the drink traffic":—

Held (affirming the decision of Bennett J.), that the main object of the gift, namely, the advancement of the application of Christian principles to all human relationships, being charitable, the gift was none the less valid because the testator had pointed out one of the means by which, in his opinion, that main object could best be attained and which in itself might not have been charitable if it had stood alone.

In re Scowcroft [1898] 2 Ch. 638 followed.

Inland Revenue Commissioners v. *Temperance Council of Christian Churches of England and Wales* (1926) 136 L. T. 27 distinguished.

THE testator, Joseph Hood, by his will, dated May 24, 1921, directed that his residuary trust estate should be paid to certain persons who were, in effect, special trustees to be held upon the trusts and provisions thereinafter contained. The material directions were in the following words : "Whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these principles and I therefore hope and trust that active steps will be taken to minimize and ultimately extinguish this enemy of my country's welfare. Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimize and extinguish the drink traffic."

The testator died on July 12, 1922. An originating summons was taken out by the Public Trustee and the special trustees, in which the Court was asked to determine whether the disposition above set out constituted a valid charitable gift.

Norman Daynes for the summons.

Spens K.C. and *Gerald Upjohn* for Nancy Hood, one of the statutory next of kin. The bequest is void for uncertainty. The trust is for a laudable purpose, which may be exercised in various ways which would not be charitable. The trust, therefore, fails, and clearly falls within the principles laid down in *Morice* v. *Bishop of Durham.* (1) In spreading Christian principles the trustees could execute the trust by means of philanthropic actions. A benevolent action may obviously be one method of spreading Christian principles. The spreading of Christian principles in itself might not be challenged, but the spreading of "the Christian principles before mentioned"—namely, as indicated in the recitals—is not a good trust: see *Dunne* v. *Byrne* (2); Tudor on Charities, 5th ed., p. 31. The wide expressions in the present will would authorize the trustees to confine the trust to proper purposes but, without committing a breach of trust, to extend those purposes to matters which could be challenged. The money could be applied so as to remedy unrest and disorder in the body politic. The gift is void if it is so wide that it need not be confined to strictly charitable purposes: see *In re Clarke.* (3) *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and*

(1) (1805) 10 Ves. 521.
(2) [1912] A. C. 407.
(3) [1923] 2 Ch. 407, 417.

Wales (1) deals with the question of temperance reform: see also, as to political objects, *Bowman* v. *Secular Society, Ld.* (2) [Reference was also made to *In re Tetley* (3) and *In re Foveaux.* (4)]

Stafford Crossman for the Attorney-General. This is a perfectly good charitable trust. A charitable bequest never fails for uncertainty: see *In re White.* (5) The question is whether the trust contained in this will is charitable in the legal sense. If it is, the Court will direct how it is to be carried out by means of a scheme. The trust is charitable for three reasons: (1.) It is a trust for the advancement of religion; (2.) it is a trust for the advancement of education; (3.) it is a trust for the benefit of the community, as being calculated to promote public morality. The principles contemplated in the will might mean the principles of Christianity in the theological sense or in the moral sense. In *In re Foveaux* (4) the Court allowed anti-vivisection to be given the status of a charity by a particular testator. He referred to *In re Wedgwood.* (6) A trust for the spreading of Christian principles if it stood alone would be charitable: see *Attorney-General* v. *City of London* (7); *Attorney-General* v. *Stepney* (8); *Thornton* v. *Howe* (9); *In re Lea.* (10) To "spread" Christianity means to "preach" Christianity. Christianity can be spread by minimizing the drink traffic. The promotion of temperance is undoubtedly a charitable purpose: *Inland Revenue Commissioners* v. *Falkirk Temperance Café Trust.* (11) The trustees have no discretion. They have an absolute trust, and it will be necessary for a scheme to be directed.

BENNETT J. This is a summons raising the question whether a gift by a testator of his residuary estate is a good and valid charitable trust. He disposed of his residuary estate in these terms. [His Lordship read the material provisions of the will.] It is said that the trust is invalid because it is not a charitable trust and because of its uncertainty. If the trust be a charitable trust it will not fail for uncertainty. The question is whether the trust is charitable in the eyes, not of a layman but of a lawyer, and, in order that it may be held to be a charitable trust in the eyes of a lawyer, it must be either a trust for religious purposes, educational purposes or the benefit of the community in general.

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(1) 136 L. T. 27.
(2) [1917] A. C. 406, 442.
(3) [1923] 1 Ch. 258.
(4) [1895] 2 Ch. 501.
(5) [1893] 2 Ch. 41, 53.
(6) [1915] 1 Ch. 113, 117.
(7) (1790) 1 Ves. J. 243.
(8) (1804) 10 Ves. 22.
(9) (1862) 31 Beav. 14.
(10) (1887) 34 Ch. D. 528.
(11) 1927 S. C. 261.

The first thing to do is to try to understand what the testator really meant by the language which he employed. I think that, when the recital which precedes the actual terms of the gift is looked at, the true conclusion to be drawn from the language used by the testator in the recitals is that he desired that the teaching of Christian principles and their application to all human relationships should be spread. I think that the language indicates a wish on his part that people should be taught to apply Christian principles in their daily lives. That is the dominating purpose of his will. Subsidiary to that was the purpose of furthering the application of Christian principles in all human relationships by inducing persons to be temperate in the consumption of, or perhaps to abstain from all, alcoholic liquor, and, in my view, the terms of the gift must be construed by giving effect to that intention.

What he has said is that the whole of his residuary estate is to be held upon trust for the spreading of the Christian principles above mentioned, and in my judgment the meaning of that language is that his residuary trust estate is to be used in spreading or preaching the application of Christian principles to all human relationships, and in taking, among other means used for the purpose of achieving that object, steps to minimize and extinguish the drink traffic. I think that, if that be the true construction of the gift, on the authority of such cases as *Attorney-General* v. *City of London* (1), *In re Lea* (2), and *In re Scowcroft* (3); the trust is a charitable trust. In *In re Scowcroft* (3) the gift was a

(1) 1 Ves. J. 243. (2) 34 Ch D. 528. (3) [1898] 2 Ch. 638, 641.

devise to the vicar for the time being of a parish of a building used as a village club and reading-room, "to be maintained for the furtherance of Conservative principles and religious and mental improvement, and to be kept free from intoxicants and dancing." This was held to be a good charitable gift, and Stirling J. says in the course of his judgment: "What is the true construction of that gift? It is said that it is a gift of a building to be maintained either for the furtherance of Conservative principles, or for the furtherance of religious improvement, or for the furtherance of mental improvement, and that a gift for the maintenance of Conservative principles is not a good charitable gift. Whether or no a gift for the furtherance of Conservative principles is a good charitable gift is a question upon which I do not think it necessary to express any opinion in this case, because it seems to me that the reading which is suggested is not the true one, but that this is a gift for the furtherance of Conservative principles and religious and mental improvement in combination. It is either a gift for the furtherance of Conservative principles in such a way as to advance religious and mental improvement at the same time, or a gift for the furtherance of religious and mental improvement in accordance with Conservative principles; and in either case the furtherance of religious and mental improvement is, in my judgment, an essential portion of the gift. It is, therefore, a gift in one form or another for religious and mental improvement, no doubt in combination with the advancement of Conservative principles; but that limitation, it appears to me, is not sufficient to prevent it from being a perfectly good charitable gift, as undoubtedly it would be if it were a gift for the furtherance of religious and mental improvement alone."

In this will it is not necessary for me, having regard to the view which I take, to express an opinion whether a gift for the suppression of drink traffic would or would not be a good charitable gift, because it seems to me that the essential part of the will is that part which deals with the application of Christian principles to all human relationships. I cannot bring myself to doubt that a gift for the spreading of Christian principles is a good charitable gift and falls within the views expressed by Stirling J. in *In re Scowcroft* (1), the question relating to the drink traffic being only subsidiary to the main question of the spreading of Christian principles. I therefore hold that the disposition constitutes a good charitable trust.

J. L. D.

C. A.

The defendant, Nancy Hood, appealed. The appeal was heard on July 8, 1930.

Spens K.C. and *Gerald Upjohn* for the appellant repeated in substance the arguments urged by them in the Court below. In addition to the cases there cited they also referred to *Hunter* v. *Attorney-General* (2); *In re Eades.* (3)

Sir William Jowitt A.-G. and *Stafford Crossman* for the Attorney-General, and *Norman Daynes* for the Public Trustee and the special trustees were not called upon to argue.

Lord Hanworth M.R. This is an appeal from a decision of Bennett J. given on an originating summons which was taken out before him for a declaration as to what was the right interpretation to be given to the terms of a clause in the will of Joseph Hood, who made his will on May 24, 1921, and died on July 12, 1922. The clause in his will concerns the destination of his residuary estate. At the time of his death he left a widow and two sons and two daughters, and there were also two children of another son who had predeceased him. Nancy Hood, one of those two children, was the next of kin to her grandfather, and she did not come of age until August 27, 1928. No arrangement, therefore, that might be made in reference to this question arising upon this clause in the will could bind her, and when she became of age she desired to have a proper declaration made by the Court as to whether or not the bequest of the residuary estate, to which I will refer in a moment, was valid or not,

(1) [1898] 2 Ch. 638, 641.
(2) [1899] A. C. 309, 315.
(3) [1920] 2 Ch. 353, 356.

or whether there was an intestacy as to that part of the residuary estate, an intestacy in which she would have been interested. Her share would have been one-fifteenth.

Upon those facts, therefore, the matter is brought before the Court, and that explains why there has been some passage of time since the death of the testator and the date of probate of the will, which was December 18, 1922, before this question has been brought to the attention of the Court. Bennett J. has decided that the bequest of the testator is a good and valid charitable bequest, and from that decision the appeal is taken by Nancy Hood. We have, therefore, to determine whether we agree with the declaration which Bennett J. has made, in other words, whether or not this is a charitable bequest.

In the circumstances that have happened, the amount of the residue of the testator's estate exceeded a sum of 6000*l.*, with the result that a proviso which was to take effect if the net value of the residuary estate exceeded 6000*l.* comes into operation. In that event the testator said in the will: "and I direct that instead of such residuary estate passing to my wife and children as aforesaid it shall be paid to" certain persons who are called the general beneficiaries, "to be held by them upon the trusts and provisions hereinafter declared and contained"; now begins the passage which is said to be obscure: "Whereas during my lifetime I have adopted certain principles which I now indicate and which I desire to be followed in giving effect to the dispositions herein contained And whereas I believe in the universality of the Christian religion and that the remedy for all the unrest and disorders of the body politic will be found in the application of Christian principles to all human relationships And whereas I believe the drink traffic to be one of the most subtle and effective forces in preventing the successful application of those principles and I therefore hope and trust that active steps will be taken to minimize and ultimately extinguish this enemy of my country's welfare. Now therefore I declare it to be my wish that my general beneficiaries shall hold the whole of my residuary trust estate together with the income thereof in spreading the Christian principles before mentioned and in aiding all active steps to minimize and extinguish the drink traffic." It will be observed that after three recitals the testator introduces the operative clause of the will by the words "Now therefore," and then he makes a declaration as to his wish for what purpose the general beneficiaries should hold the residuary trust estate. Mr. Spens, on behalf of the appellant, then points out that the subsequent passage has two limbs to it: The trust estate together with the income is to be held in "spreading the Christian principles before mentioned, and in aiding all active steps to minimize and extinguish drink traffic." He says that those words indicate two separate and distinct spheres of activity: (1.) The spreading of Christian principles before mentioned; (2.) the aiding of active steps to minimize and extinguish the drink traffic. While he would not contest that the spreading of Christian principles is a good and valid charitable purpose, he argues that the aiding of active steps to minimize and extinguish the drink traffic may and, perhaps, ought to be construed as indicating the support of political and legislative steps for those purposes, activities which do not necessarily come within the tests applied by lawyers to what is charitable; and if they do not come within those tests, then in accordance with the well known principle if the testator has indicated alternatives which may be followed, one of which is not charitable in the legal sense, then the bequest cannot be held to be for an exclusively charitable purpose. I think that represents the argument of Mr. Spens quite fairly, an argument which he has presented with admirable clearness. Therefore we have to go back and consider what is the proper construction to be placed upon this clause.

As I have said there are three recitals: First, that the testator believes in the universality of the Christian religion, and that the remedy for the unrest will be found in the application of Christian principles to human relationships; secondly, that the drink traffic is one of the most subtle and effective forces in preventing the application of those principles, and, therefore, he expresses, thirdly, the hope that active steps will be taken to minimize and ultimately to extinguish the enemy of his country's welfare. Reading those, I think quite fairly, and as they are set out by the testator himself, without supplying words or subtracting words, reading them in accordance with the canon which has been laid down by Lord Halsbury in *Hunter* v. *Attorney-General* (1), it would seem quite plain that the first recital is of dominant force—namely, his belief in the universality of the Christian religion; and that with the application of that and the Christian principles embodied in it, there will be advantages to the whole body politic, and next that he believes a barrier to the advancement of that religion and those principles is interposed by the subtle and effective force of drink. He wishes that steps should be taken for the advancement of the Christian religion, and of Christian principles, by the withdrawal of the subtle and effective force which at the present time operates as a barrier against the advancement of the Christian religion and its principles. I think that is a paraphrase closely following, as indeed it is intended closely to follow, the very words of the testator. It does not, therefore, appear that so far he has indicated anything but a purpose to advance the Christian religion and its principles. Then the direction is that the trust estate is to be held for the purpose of spreading those Christian principles, which, of course, are illustrative of the Christian religion, and also in aiding active steps to get rid of this barrier which prevents its advancement; and, as Romer L.J. has pointed out, if you use the words which are in the second part, the operative part, "minimize and extinguish," bearing in mind the words previously used, to minimize and ultimately extinguish, it would appear as if the purpose of the testator is little by little, step by step, to get rid of this subtle and effective force standing in the way of the advancement of the Christian religion.

I find it difficult, and indeed impossible, to accept the view presented by Mr. Spens. I do not think that two separate spheres of activity are indicated. I think that

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(1) [1899] A. C. 309.

C. A.
1930
HOOD,
In re.
PUBLIC
TRUSTEE
v.
HOOD.
Lord Hanworth,
M.R.

throughout the recitals, and in the operative part, a plain intention is indicated of the advancement of Christian principles, with a particular method by which that advancement may take place—namely, by gradually extinguishing the drink traffic. I do not know that the word "traffic" has any reference to the Legislature. It appears to be to the system of selling and buying drink. In that construction it does not appear to me that the testator has done more than indicate that he desires to have a spread of Christian principles.

Turning to one or two of the cases which have been referred to, it must be borne in mind that it is a principle of the law long established, that where there is an intention to devote property to charity, effect must be given to it. Unless, therefore, there is something in this clause which withdraws the effect of the user of these words, that is to say, his belief in the universality of the Christian religion, and the application of Christian principles, there is no doubt that there is a clear indication of a charitable intention. Lord Macnaghten, in the well known classification which is found in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) (and which classification is, in fact, still older, for it has been pointed out that it appears in the argument presented in *Morice* v. *Bishop of Durham* (2)), set out, as we all know, four categories—namely, "poverty, education, religion, or trusts for other purposes beneficial to the community not falling under the preceding heads." It will not be necessary for the present purpose, but I should have no hesitation in saying that I agree with the judgments and words used by Lord Blackburn and Lord Sands in *Commissioners of Inland Revenue* v. *Falkland Temperance Café Trust* (3)—namely, as Lord Blackburn puts it (4): "I do not think it can be questioned that the object of reducing intemperance is one which is not only beneficial to those who have fallen, or may fall, under the curse of drink, but is also beneficial to society at large." If, therefore, there are no cases to be found precisely upon the

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(1) [1891] A. C. 531, 583.
(2) (1804) 9 Ves. 399, 406.
(3) 1927 S. C. 261.
(4) Ibid. 269.

C. A.
1930
HOOD, *In re.*
PUBLIC TRUSTEE *v.* HOOD.
Lord Hanworth, M.R.

point I am inclined to attribute that lack not to any doubt, but rather to the general acceptance of that view by those who have been concerned to consider the terms of wills. I should be, therefore, quite ready to say that if the clear intention had been to provide money for the purpose of the advancement of temperance the gift would be for a good charitable purpose. I do not think that the six directions which are given in the will are to be taken as showing any reflex interpretation to be placed upon the operative clause to which I have referred. They are indicative of methods by which the advancement of temperance may gradually be secured, and I therefore come without hesitation to the same view as Bennett J. as to what construction ought to be placed upon this clause

I will only add a word more as to two cases to which reference has been made. Rowlatt J., *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (1), came to the conclusion in that case that the Association were not entitled to the exemption from income tax under s. 37 of the Income Tax Act of 1918, because it was not established for charitable purposes only —those are the words that have to be complied with—but was established for political activities, and therefore could not bring itself within those exclusive words. But I agree with Bennett J. that the reasoning of Stirling J. (as he then was) in *In re Scowcroft* (2) is more helpful in the present case. In that case Stirling J. had to determine whether a gift of a building to be maintained for the furtherance of Conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing, were words which were to be read distributively, so that they embraced purposes other than those which could be claimed to be charitable within Lord Macnaghten's last category. Stirling J. held that: "In either case, the furtherance of religious and mental improvement is, in my judgment, an essential portion of the gift." He held the gift to be valid. So here, I think that on the best construction I am able to place upon this

(1) 136 L. T. 27.

(2) [1898] 2 Ch. 638, 641.

clause, an essential portion of this gift is for the advancement of religious principles in the belief of the universality of the Christian religion as a dominant force, and for that purpose, and subservient to that purpose, there is an indication of a means whereby the advancement may be carried out—namely, by the withdrawal of what is a subtle and effective barrier to it, but always that withdrawal is to be made for the purpose of the successful application of the principles of the Christian religion. Having regard, therefore, to the view that that is the dominant purpose, it appears clearly that this is a bequest for a charitable purpose, and accordingly I agree with Bennett J., and this appeal must be dismissed with costs.

LAWRENCE L.J. The answer to the question raised by this appeal depends entirely upon the construction to be placed upon the particular language used by the testator to express his intention. In my opinion there is little doubt as to the meaning of the bequest in question. As I read the will, the main object of the bequest is the application of Christian principles to all human relationships, and thereby to spread such principles. That object undoubtedly, in my opinion, is a charitable object, and if it had stood alone I think that Mr. Spens would not have contended the contrary. Then the testator, after stating that he believes the drink traffic to be one of the most subtle and effective forces in preventing the successful application of these main principles expressed a hope and trust that: "Active steps will be taken to minimize and ultimately extinguish this enemy of my country's welfare," and in the operative part of his will authorises his trustees to spend his residuary estate, not only in the spread of the Christian principles he has referred to, but also in aiding all active steps to minimize and extinguish the drink traffic.

It is contended that the authority so conferred upon the trustees adds a further object to the main object which I have mentioned, which additional object is non-charitable, and therefore, on well known principles, the whole gift fails. In my judgment there are two answers to this contention.

Lawrence L.J.

The first is that the added object relied upon by Mr. Spens is an object which, in itself, is charitable. I construe the words "in aiding all active steps to minimize and extinguish the drink traffic" as meaning the promotion of temperance. Temperance itself is undoubtedly a charitable object. It comes within the fourth class of objects which are charitable, because many people regard temperance as contributing to the moral improvement of mankind. The case decided by Rowlatt J. of *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (1), to my mind, is distinguishable on the ground that in that case the gift was not for the promotion of temperance generally, but was for the promotion of temperance mainly by political means, and therefore taken out of the class of charitable objects to which I have referred. But there is a second answer. Even if the object of aiding active steps to minimize and extinguish the drink traffic be non-charitable, I think that the learned judge was right in holding that it was not an independent additional object, but was merely introduced by the testator as pointing out one of the ways by which his main object could be attained, and that the trustees were only authorized to spend money in minimizing and extinguishing the drink traffic, in so far as they were thereby furthering the main purpose of the bequest. That main purpose being charitable, it seems to me that it is none the less good because the testator has pointed out one of the means by which in his opinion that main object could best be obtained, which in itself might not have been charitable if it had stood alone. For these reasons I think that the judgment of Bennett J. is right, and ought to be affirmed.

ROMER L.J. I agree. As I read the testator's will, the dominant object of this clause in which he disposes of his residue is to advance the application of Christian principles to all human relationships, and the testator appears to desire to bring about that end in two ways: (1.) by spreading the Christian principles, and, secondly, by promoting temperance,

(1) 136 L. T. 27.

and gradually getting rid of intemperance which, as appears from one of the recitals, he regards as one of the gravest enemies of the object that he had in view. In my opinion the testator's dominant object was most assuredly a charitable one, and of the two particular ways he indicated for the purposes of carrying out that dominant object the first is admittedly charitable. In my opinion the second is also charitable for the reasons that have been given by the Master of the Rolls and Lawrence L.J. But I agree with Lawrence L.J. that even if the second of those objects is not considered strictly to be charitable, yet one ought, in a case like this, to apply the method of construction that was applied by Stirling J. in *In re Scowcroft* (1), which is referred to by Bennett J. in his judgment. In that case Stirling J. had to deal with a gift which I need not repeat now, and he construed it he said as a gift for the furtherance of Conservative principles in such a way as to advance religious and mental improvement at the same time. Applying that to the present case, having regard to the dominant intention of the testator, one must regard the direction that the trustees are to aid all active steps to minimize and extinguish the drink traffic as being qualified by the words "for the purpose of advancing and bringing about the application of Christian principles to all human relationships." For these reasons I agree with the decision of Bennett J., and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Howard, Cant, & Cheatle, Birmingham.*

Solicitors for defendant trustees: *Swepstone, Stone, Barber & Ellis, for G. T. Smith & Lyde, Birmingham.*

Solicitor for Attorney-General: *The Treasury Solicitor.*

(1) [1898] 2 Ch. 638.

W. I. C.

MAUGHAM J.

1930

July 17, 18, 21, 22.

ATTORNEY-GENERAL *v.* MANCHESTER CORPORATION.

[1929. A. 2201.]

Local Authority—Land acquired under Statute—Plot of Land handed over for "open space"—Erections on Plot—Public User—Plot appropriated to build Tuberculosis Dispensary—Approval of Minister of Health—Action for Injunction to restrain Building—No Dedication or Public Right of Way—Lands "not required for the purposes for which those lands have been acquired"—Absolute Discretion of Local Authority—Manchester Corporation Act, 1844 (7 *&* 8 *Vict. c. xli.*), *ss.* 88, 94—*Manchester Corporation Act,* 1845 (8 *&* 9 *Vict. c. cxli.*), *s.* 25—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 175—*Public Health Acts* (*Amendment*) *Act,* 1907 (7 *Edw.* 7, *c.* 53), *s.* 95.

A local authority acquired, in 1875, an area of land under its Act, in accordance with which it laid out streets and made improvements in the area. But a plot of land included in the area was practically neglected for sixteen years, and was then handed over to the local authority's Parks Committee for use as an open space and was drained and gravelled. Later, a fountain and certain structures were erected on the plot, and the public used the plot freely and continuously. In or about 1928 the local authority wished to build a tuberculosis dispensary and offices on the plot, and the Minister of Health approved its appropriation for that purpose. In an action by the Attorney-General on relation for an injunction to restrain the local authority from building so as to interfere with the right of user and enjoyment of the plot by the public:—

Held, (i.) that the public had not acquired by user a public right of way over the plot:

(ii.) that, on the true construction of s. 95 of the Public Health Acts (Amendment) Act, 1907, it is for the local authority to decide whether lands acquired by it for a specific purpose are "no longer required" for that purpose:

(iii.) that the public rights over the plot were general and to some extent precarious, and could be destroyed under s. 95 of the Public Health Acts (Amendment) Act, 1907.

Folkestone Corporation v. *Brockman* [1914] A. C. 338 followed.

Attorney-General v. *Hanwell Urban District Council* [1900] 2 Ch. 377 referred to.

ACTION.

This was an action by the Attorney-General on the relation of Ben Kauter for an injunction to restrain the Manchester Corporation (hereinafter called "the Corporation") from building a tuberculosis dispensary and offices on a piece of land (hereafter called "the land") included in an area of ground acquired by the Corporation under its statutory powers in 1875 for the purposes of street widening and improvements, or otherwise interfering with public rights to use the land as a footway.

The land was bounded on the south side by Denmark Road, on the east side by Oxford Road, on the west side by Aberdeen Street, and on the north side by land and premises occupied by Mr. Warwick Brookes, a photographer. In area it contained about 1555 square yards. At the time of this action it had on it four shrubberies, a fountain in the middle, and a shop and a public convenience at the south-east corner: and it was gravelled, and was at the same level as the adjoining streets. Until the building of a wall by the Corporation shortly before the date of this action, it could be reached from almost any spot in Oxford Road, from a pavement in that road, from a space about 10 feet wide in Denmark Road between two shrubberies, from a space somewhat wider at the south-east corner, at the junction of Aberdeen Street and Denmark Road, and from a somewhat similar space between two shrubberies in Aberdeen Street. There had been a wall along the north side of the land, and a shrubbery extending for the whole 152 feet of that northern portion of it. The shrubberies were surrounded with railings, and the public had never had any admission to them. The fountain in the middle was intended for public use, as, also, was the public convenience at the south-east corner situate behind the shop, which had been there for a considerable time and was shielded to some extent from public view by the shrubbery in the south-west corner.

The powers under which the land was acquired were conferred upon the Corporation by s. 94 of the Manchester Corporation Act, 1844. (1)

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(1) Sect. 94: "And be it enacted, that the sites of all houses, and all pieces of ground, or any parts thereof, which may be purchased by the Council, and laid into any of the streets within the said township, shall, when and so soon as the same shall be so laid into the said streets, and forever thereafter, form part thereof and of the public highways, and shall be maintained and repaired and kept in repair in such

Accordingly, having so purchased the land in question, the defendant Corporation laid out the streets afterwards known as Denmark Road, and some other roads in the neighbourhood, and proceeded to make pavements of the ordinary kind and to sewer and metal the roads on three sides of the space in question, so far as it was necessary to do so; but for a considerable time after that was done, the piece of land was left in a very rough, unsatisfactory and unsightly condition, and was at one time offered for sale as a building site.

It was not until the year 1891 that the Corporation and the Whitworth Trustees, legatees and devisees of Sir Joseph Whitworth, began to take an interest in the piece of land, and that something was definitely done with regard to it. On January 20, 1891, the then Town Clerk of the Corporation wrote to Mr. Darbishire, who was the acting trustee for the Whitworth legatees, as they were called, who were at that time laying out and providing, or had laid out and provided, the Whitworth Park, which extends to the southward of Denmark Road and of the space in question, the following letter: " Dear Sir,—The attention of the Sanitary Committee having been directed to the necessity of providing a urinal in the neighbourhood of the Whitworth Park, that Committee have caused to be prepared a plan of intended urinal, of which I enclose a tracing. It is proposed to be constructed in Denmark Road, near the junction with Oxford Road, and I am desired to enquire whether the Whitworth legatees are willing to allow the work to be carried out as suggested, it being of course understood that the whole expense of providing, maintaining, and cleansing the urinal will be defrayed by the Corporation." The reply on the following day is: " The site referred to is now part of the Institute land "; and accordingly there was a substituted proposal which took

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and the same way and manner as the other part of such streets shall for the time being be by law maintained, repaired, and kept in repair; and all such parts of any street as in consequence of any improvement made under the authority of this Act may not be longer wanted for such street shall be vested in the said Mayor, Aldermen, and Burgesses, freed and discharged from the public use thereof."

shape on March 7, 1891, and is shown in the letter of Mr. Darbishire, on behalf of the Whitworth legatees, to Mr. George Clay, the chairman of the Improvement Committee. It is headed "Denmark Road Corner. Dear Sir: Perhaps it will be better that I should put this suggestion of the Institute Council as to the corner plot before you in writing. You know the corner plot belonging to the Corporation in Oxford Road, north of Denmark Road. The 'Institute'—that was the Manchester Whitworth Institute—is now preparing for plans for its museum, which are to be arranged so as to front Denmark Road, and may in course of years be greatly extended. The whole front towards Denmark Road from Oxford Road to Acomb Street will be available. The Council earnestly beg the Corporation to dedicate the corner plot to public use as an 'open space,' in order that what will be a handsome and important building and its façade may not in future be choked up by smaller erections on the north side of Denmark Road, and may further be opened towards and well seen from Oxford Road. Our proposal, as I further told you, was that the site should be drained and prepared for a permanent gravel surface, and that if the City would pay for this work we of the Institute would see the work properly done, and would further make some sufficient beds and plant suitable trees on convenient parts of the ground, without interfering with public walking on the ground (already very great) or the view from Oxford Road. It would be convenient to maintain a cabmen's shelter near Denmark Road, and a convenient public accommodation house could very well be erected on the north margin of the plot partly hidden by shrubbery."

On March 11, 1891, the Improvement Committee of the Corporation, according to a minute of the Committee of that date, "proceeded to Denmark Road corner of Oxford Road. The Chairman explained the proposed scheme of the Whitworth legatees, and the interview of the Mayor, the Chairman of the Sanitary Committee, and the Chairman of the Improvement and Buildings Committee, with a deputation from the Whitworth Institute held in the Mayor's parlour on Friday, March 4," and the resolution was: "That the Committee recommend the Council to hand over the plot of vacant land at the corner of Oxford Road and Denmark Road to the Parks Committee to be used as an open space with the suggestion that the Whitworth Trustees be allowed to lay out the land, and that the Sanitary Committee be recommended to put up a public convenience and also to make provision for a cab stand." On April 8, 1891, there was a Council meeting of the Corporation. The recommendation was read, and the proceedings of the Improvement and Buildings Committee having been read, it was resolved "That the proceedings of the Improvement and Buildings Committee now read, including their recommendation in relation to land at the corner of Oxford Road and Denmark Road, be approved and adopted." Thus, the defendant Corporation did hand over the plot of land in question to the Parks Committee to be used as an open space, with the suggestion that the Whitworth Trustees be allowed to lay out the land, and that the Sanitary Committee be recommended to put up a public convenience, and also to make provision for a cab stand.

The correspondence in the case showed that the proposal was carried out. The Whitworth Trustees did make an arrangement for the laying out of the land, the shrubberies were constructed, shrubs and trees were planted, and the land was drained and gravelled. The Improvement Committee were kept in touch with the work done by the Whitworth Trustees, as appeared from a letter of January 9, 1893, from Mr. Darbishire to the chairman of the Improvement Committee. The Corporation agreed to pay the expense thereof, and the whole work was carried out at the cost of some 700*l.* or 800*l.*, which was paid over, in the first instance, by the Whitworth Trustees, and then repaid to the Whitworth Institute by the Corporation. On March 24, 1893, when this work had been practically completed, Mr. Darbishire wrote to Mr. George Clay, the chairman of the Improvement Committee: "My dear Sir,—Open Space, Denmark Road. I think we shall make a good job of this and the work is going on well. I am desired by the legatees of Sir J. Whitworth to offer to put up a simple granite drinking fountain in the centre, if the Corporation will put a lamp upon it and undertake the supply of water and light. Please let me know as soon as you can whether the offer is accepted, so that the work may be done while the men are about." Mr. George Clay's reply of two days later was as follows: "I am obliged for yours of March 24, stating that the legatees of the late Sir Joseph Whitworth are prepared to put up a granite drinking fountain in the centre of above. I will bring the matter before the Improvement Committee at its next meeting in about a fortnight, but, as you very properly wish to be set at liberty, I have consulted with the Mayor, the Chairman of the Gas Committee, and the Chairman of the Waterworks Committee. You may take it for granted that the Corporation will most heartily accept the generous offer of the legatees, and will undertake to erect a lamp upon it and supply the fountain with light and water for all time." On April 11, 1893, the Improvement Committee held their meeting, and they resolved: "That the proceedings now read be approved and adopted, that the offer of the Whitworth legatees to place a granite drinking fountain on the open space, Denmark Road be, and the same hereby is, cordially accepted, and that the best thanks of this Committee be tendered therefor." Those proceedings were in some form made binding on the Corporation. The expenses of making the open space a convenient and sightly place were borne by the Corporation. The Corporation duly put a lamp upon the fountain, and they proceeded, and at the date of this action were still continuing, to supply water to the fountain and light to the lamp above it.

Since the year 1891 the Corporation had done various acts upon the land: they had accommodated a cabmen's hut, which was removed in about the year 1893, and was a mere temporary structure. They then made a cabmen's shelter, which was converted into a shop in 1895 and enlarged in the year 1899, and let from time to time at a rent. It was from time to time described as a kiosk in the course of this action. The next step was the erection of a public lavatory for males in the year 1895. They also placed a fire brigade hut at one time on the land and kept a fire escape there. They also proposed at one time and considered the erection of a lavatory for ladies, which proposal, however, was ultimately not proceeded with. On October 12, 1900, there was a straightening of boundaries at the top of the land, but the conveyance, or, rather, the deed of exchange of the two freehold plots of land at that space contained a recital that Mr. Warwick Brookes and the Corporation some time before agreed to exchange the said lands and buildings " with the object of straightening the boundary lines between the said adjoining hereditaments of the said Warwick Brookes and the open space lying between Oxford Road and Aberdeen Street," and it also recited that " the boundary was accordingly so straightened in or about the month of April, 1893, but no deed of conveyance or deed of exchange of such lands has yet been executed." Thereupon, on October 12, 1900, that was carried out.

Since 1893, that part of the land that had not been enclosed with railings or occupied by buildings for the time being had been open to the public, who walked freely across it, and children played there and people walked about it. Further, the plot of land was used as a short cut by people who were going down, that is to say, coming southwards, along Oxford Road, and who wanted to get to the western corner of Denmark Road; they would naturally cut across from the north-east corner to the south-west corner of the plot, which was unobstructed, passing between the two shrubberies at the south-west corner, and vice versa; and people coming across from, e.g., the north-western end of the plot would cut across to the south-east end, so far as they could, to get down to Oxford Road, and again vice versa. The space was necessarily used de facto as a right of way by people crossing the land along the two directions.

Shortly before this action the Corporation conceived the idea of using the piece of land for the purpose of a tuberculosis dispensary and offices, and there was correspondence with the Ministry of Health. After some delay a local inquiry was held in October, 1928. It was held for the purpose of obtaining, if possible, from the Minister of Health his approval of the use of the land for the purpose of the erection thereon of a tuberculosis dispensary and offices, and for sanction to borrow the sum of 24,000*l*. for the purpose of that erection. On December 27, 1928, the Minister of Health, in pursuance, or purported pursuance, of s. 95 of the Public Health Acts (Amendment) Act, 1907, as declared to be in force in the City of Manchester by an order dated April 5, 1910, thereby approved of the appropriation, by the Council of the said city, for the purpose of a tuberculosis dispensary and offices, of the piece of land in question: and it was under the official seal of the Minister, and was, as far as the section was applicable, binding on the Court. A number of people objected to the proposal, and, after further correspondence and an endeavour to persuade the Corporation not to act upon the authority granted to it (including a protest by the relator in this action), the fiat of the Attorney-General was obtained and the writ in this action was issued on June 4, 1929, the claim being for an injunction to restrain the Corporation from allowing a wall to remain erected and/or from building a tuberculosis dispensary and offices or other buildings on the land so as to interfere with the right of user and enjoyment of the land by the public as an open space and open and uncovered footway, or from otherwise obstructing or interfering with the rights of the public to use the land as an open and uncovered footway.

Sir Gerald Hurst K.C. and *John Bennett* for the plaintiff. The Manchester Corporation Act, 1844, enabled the Corporation to acquire land for the purpose of street widening and for other purposes. Power of sale was derived from s. 25 of the Manchester Corporation Act, 1845. (1) Where the Corporation has exercised an option to appropriate for purposes

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(1) Sect. 25: "And be it enacted, that in any case in which the Council shall have purchased or acquired, either under the fourth—recited Act" (i.e., the Manchester Corporation Act, 1844) " or this Act, any houses or ground within the borough which shall not be required for the improvement thereof, it shall be lawful for the Council to sell and dispose of all or any part of such houses or ground to such person, and at such time and in such manner, as the Council shall think proper; and

MAUGHAM J.
1930
ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

other than street widening and the other purposes specified in the Act of 1845, it can no longer say that what it is doing is within that Act. There was continuous user of this plot of land by foot-passengers right up to 1929. It was never used as a park; there has never been a seat on it, and it has never been used as a place of recreation or repose. It is, and for years has been, crossed by thousands of persons. The acts of the Corporation must be considered in the light of the statute. The only ways in which the Corporation can act are under its statutes of 1844 and 1845. In 1891, it deliberately determined to appropriate land for the purposes defined in s. 88 of the Manchester Corporation Act, 1844. (1)

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the receipt of the Treasurer of the Borough shall be a sufficient discharge to the purchaser of any such houses or ground for the money in any such receipt acknowledged to be received."

(1) Sect. 88: "And whereas the rapidly increasing population and trade of the borough of Manchester may render many of the streets within the said township too narrow for the convenient despatch of business and the comfort of the inhabitants, and it would be of great public advantage if the council were authorised to make such alterations in the said streets as they may from time to time think necessary; be it therefore enacted that it shall be lawful for the council to agree with the owners of any house or of any piece of ground within the said township for the absolute purchase for a consideration in money of any such house or ground, or such parts thereof as the council shall think proper, and of all subsisting leases therein, and of all rentcharges, annuities, mortgages, or incumbrances affecting any such house or ground, and all other estates or interests in such house or ground whatsoever, and to pay for the purchase of such house or ground, and of all rentcharges, annuities, mortgages, or incumbrances affecting the same, and of all other estates or interests therein, out of the funds vested in the council for the improvement of the said township, under or by virtue of the said recited Acts and of this Act, or any of them, such sum or sums of money as shall be agreed upon between the council and the owners and other persons interested therein; and the council, after such purchase made as aforesaid, may order such house or such part or parts thereof to be taken down and removed, and the site thereof and such piece of ground so purchased by them, or any part thereof, to be laid into the said streets, for the widening, enlarging and, rendering more commodious the same, or to be otherwise disposed of for making new streets, or otherwise for the improvement of the said township, as the council shall think proper; and all powers and provisions herein expressly or by reference provided with respect to the purchase and taking of the houses or ground mentioned in the said Schedule (A), and for ascertaining the value thereof, and any damage sustained by the persons interested therein, and for the payment and investment of the purchase monies, and for the

MAUGHAM J.

1930

ATTORNEY GENERAL *v.* MANCHESTER CORPORATION.

It is clear that in 1891 the Corporation intended this plot of land to remain unbuilt upon for ever: *Offin* v. *Rochford Rural District Council.* (1) The appropriation of this land is conducive to the purposes of s. 88 of the Act of 1844: *Attorney-General* v. *Sunderland Corporation.* (2) In this case, the throwing into the footways of a substantial portion of the plot improves the footways in their character of public footways. It is quite within the language of s. 88: *Attorney-General* v. *Sunderland Corporation.* (3)

Assuming that there was no dedication, the fact that the land was used as an open space does not prevent the Corporation from creating and effectually dedicating a public right of way. A highway cannot be destroyed by s. 95 of the Public Health Acts (Amendment) Act, 1907 (4); *Attorney-*

payment of the expenses attending the purchase of any such houses or ground by the council, save and except the powers for the compulsory purchase or taking of the houses or ground mentioned in the said Schedule (A), shall be applicable to such house and the ground occupied therewith now hereby authorised to be purchased and taken as aforesaid, in the same manner as if such house and ground had been described in the said Schedule."

(1) [1906] 1 Ch. 342.

(2) (1875) 2 Ch. D. 634.

(3) [1929] 2 Ch. 436; [1930] 1 Ch. 168.

(4) Sect. 95: "The powers of a local authority under sections one hundred and seventy-five and one hundred and seventy-six of the Public Health Act, 1875, shall extend to highway purposes, and notwithstanding anything in section one hundred and seventy-five of the Public Health Act, 1875, or any general provision in any local Act, any lands acquired by a local authority and not required for the purposes for which those lands have been acquired may be appropriated for any purpose approved by the Local Government Board, subject, nevertheless, to any special covenant or condition affecting the use of the lands attached thereto at the time of the purchase by the local authority, or to any special provision affecting the use of the lands contained in any local Act: Provided that the local authority shall not, on any lands so appropriated, create or permit any nuisance; and that the local authority shall not, on any such lands, sink any well for the public supply of water, or construct any cemetery, burial ground, destructor, station for generating electricity, sewage farm, or hospital for infectious disease, unless, after local inquiry and consideration of any objections made by persons affected, the Local Government Board, subject to such conditions as they think fit, authorise the work or construction.

Nothing in this section shall affect any rights acquired before the commencement of this section under any judgment or order of a court of competent jurisdiction, or under any agreement in writing, but if a dispute, one of the parties to which is a local

General v. *Manchester Corporation* (1); *Grand Junction Canal Co.* v. *Petty.* (2) The correspondence of 1891 and 1893, and the undertaking by the Corporation that the fountain shall be supplied on their site, is consistent with the view that dedication was intended.

W. P. Spens K.C. and *F. R. Evershed* for the Corporation. The plaintiff is asking the Court to find that an appropriation was made of this particular land which had the effect of making it part and parcel of a highway or highways, and to say that the powers given to the Ministry of Health cannot possibly authorize the use of the land for any other purpose. The Court ought to find that at no time has this land become part of the highway. There is nothing between full highway rights qua highway, and no rights at all. No appropriation intended in 1891 was an appropriation literally as an open space. It would have been wholly ultra vires at that time for the Corporation to have appropriated this land permanently as an open space: but there is no objection in law to allowing land to be used as an open space; that can be done in the exercising of the Corporation's powers. This is not a case in which the origin of the user is unknown. It is not a case of user for many years by the public without evidence to show how the user arose. Thus the question whether there has or has not been dedication is a question of fact for the Court. Dedication involves an intention and an unequivocal act carrying the intention into effect. The Court must ascertain the intention of the owner of the soil, and can, in spite of user, find that there was no intention to dedicate: *Folkestone Corporation* v. *Brockman* (3); *Piggott* v. *Goldstraw* (4); *Attorney-General* v. *Bradford Corporation.* (5)

authority, arises under such an agreement as to any such right, the dispute shall, if either party so require, be settled by the Local Government Board as if it were a doubt or difference within the meaning of section three hundred and four of the Public Health Act, 1875, and the Local Government Board may for that purpose deal by Order with any matters which may be dealt with by an Order or Provisional Order under the said section."

(1) [1906] 1 Ch. 643, 651, 656.
(2) (1888) 21 Q. B. D. 273.
(3) [1914] A. C. 338, 359.
(4) (1901) 65 J. P. 259.
(5) (1911) 75 J. P. 553.

The word "dedicate" does not appear at all in the Council's resolution, which merely approves of the user of the land as an open space: *Attorney-General* v. *Teddington Urban District Council.* (1) The material sections of the Open Spaces Act, 1887, do not apply to municipal corporations. Sect. 95 of the Public Health Acts (Amendment) Act, 1907, goes back to the purposes for which the lands were acquired. The Local Government Board must be satisfied that they are "no longer required" for those purposes. If it is so satisfied, it may approve of the appropriation for any purposes, subject to certain safeguards.

[Reference was also made to the Public Health Act, 1875, s. 175. (2)]

In the present case the Court is not concerned with legal rights of way; and on the evidence there was never any intention on the part of the Council to dedicate this land for rights of way: *Robinson* v. *Cowpen Local Board* (3); *Attorney-General* v. *Hanwell Urban Council.* (4)

Sir Gerald Hurst K.C. in reply. *Piggott* v. *Goldstraw* (5) is really not in point at all, because in that case the embayments were very small. It is a very special case, not analogous to the case now before the Court. The powers under which the land was here acquired were for street widening and improvement: and the only powers which the Corporation had in 1891 to deal with the land were under the Acts of

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(1) [1898] 1 Ch. 66.

(2) Sect. 175: "Any local authority may for the purposes and subject to the provisions of this Act purchase or take on lease sell or exchange any lands, whether situated within or without their district; they may also buy up any water-mill dam or weir which interferes with the proper drainage of or the supply of water to their district.

Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold at the best price that can be gotten for the same, and the proceeds of such sale shall be applied towards discharge, by means of a sinking fund or otherwise, of any principal moneys which have been borrowed by such authority on the security of the fund or rate applicable by them for the general purposes of this Act, or if no such principal moneys are outstanding shall be carried to the account of such fund or rate."

(3) (1893) 63 L. J. (Q. B.) 235.

(4) [1900] 2 Ch. 387.

(5) (1901) 65 J. P. 259.

1844 and 1845. "No longer required" is an inappropriate expression to describe land which has been already dedicated to the public by the Corporation in pursuance of the powers which have enabled it to acquire the land. Sect. 95 was never intended to have the effect of destroying public rights.

MAUGHAM J. [having stated the facts:] I have now to express my opinion as to the effect of what was done by the Corporation in the years 1891 and 1893 according to the correspondence and to the minutes to which I have referred. In doing so, I have, of course, to bear in mind the powers of the Corporation under s. 94 of the local Act of 1844. They had power to throw any of the land which they bought in the year 1875 into any of the streets within the township. Under s. 88 of the Act, being the section which authorized the Council to purchase houses or grounds for effecting additional improvements, it was provided as follows: [His Lordship read from the section, and continued:] I would add that there is in s. 154 a definition of the word "street" which makes it include "any square, street, court or alley, highway, lane, road, thoroughfare, or public passage, or place within the township of Manchester." Accordingly, there is little doubt but that the whole or any part of the plot of land in question might have been laid into the said streets; for instance, into the three streets, or partly one or partly the other, so that the whole of it was laid into those three streets, and the plot of land would then have been a portion of a street or streets, and would thereafter have formed part of the public highway. I have, however, to bear in mind the fact that, in the first instance, it was not intended to throw the plot of land into the streets. It was intended in the first instance to sell it as a building site, and it was not until the year 1891 that the events happened which I have detailed, which resulted in the Corporation taking a particular step with regard to the piece of land.

In my opinion, I am bound to form the view that the piece of land in question was not laid into any of the streets within the township, and that the resolution of the Corporation, so far as it can be ascertained from the facts which I have already stated, was that the piece of land should be used for "the improvement of the township" within the meaning of those words contained in s. 88 of the local Act, an improvement, no doubt, for the purpose of making the new streets, or that part of the township in which the new streets were to be made, more pleasant or convenient for the use of the inhabitants of Manchester in that portion of that great city. The correspondence and the minutes, to my mind, show clearly that the piece of land was laid out by the Whitworth Trustees at the expense of the Corporation as an open space in a popular sense.

I ought to state here that the Open Spaces Act, 1887, does not apply to the Corporation of Manchester, nor is there any other Act relating to open spaces which has any relevance to the present case; and when I use the words "open space" I mean only an open space in the sense of a space on which buildings were not to be erected, except so far, no doubt, as the Corporation might think fit from time to time to erect such buildings for the purposes of the inhabitants, as, for instance, a public convenience or a firemen's shelter, or something of that kind. Having regard to the correspondence, and to the resolutions in reference to the public fountain in the centre of the space, I must come to the conclusion that the Corporation at that time intended that the lay-out of the ground should be permanent and, indeed, subject to any future event such as those which I have mentioned, perpetual There is not a word to show that the lay-out in 1891, carried out largely in 1893, was of a temporary character.

I am not convinced that the word "dedication" is really an appropriate word in relation to the acts of a local authority dealing with property which it has acquired under public or local Acts. At any rate, such a word may be misleading When a private landowner dedicates a road which he has laid out to the public, he is dealing with his own property and is doing a public-spirited act for the benefit of the public at large. A local authority has land vested in it for the purpose of carrying out its duties as a local authority. It is not entitled, generally speaking, to give away a portion of the property vested in it as a local authority. It is no doubt entitled, under certain sections of the Public Health Act to which I need not refer, and very often under local Acts, to make public roads, or to take over roads with the result that they become public and repairable by the inhabitants at large; but those rights are rights which are strictly defined, and when a corporation or other local authority acquires land for a particular purpose, the word " dedication " is quite unnecessary in such a connection, if all that is intended is to say that the local authority prima facie cannot use the land except for the purpose for which it has been authorized to purchase it. A fortiori, if it has obtained a loan to enable it to acquire the land for a particular purpose, or expended local funds in acquiring lands for such a purpose, it is not entitled to change its mind and to apply the land for a different object or purpose. Apart from s. 95 of the Public Health Act, 1907, I should have felt bound to come to the conclusion that the Corporation, having under their powers laid out this land for the improvement of the township under the circumstances mentioned, and with the intention, as clearly shown by the correspondence in reference to the fountain, that the improvement should be permanent, would not have been entitled to alter the nature of the user of the piece of land.

Having stated my view as to the acts of the Corporation in 1891 and 1893, the next question that arises is whether, having regard to the lay-out of the ground as an open space in the way described, it was possible for the public to acquire a public right of way over the land by the extensive user which took place along what I may call the two diagonals. In my opinion it would be wrong to come to any such conclusion. There is now no doubt as to the legal position in relation to the acquirement of a public right of way. The House of Lords in *Folkestone Corporation* v. *Brockman* (1) clearly laid down that notwithstanding a long continuous user of a road by foot passengers, indeed, for upwards of eighty years without interruption, it was yet necessary to

(1) [1914] A. C. 338.

MAUGHAM J.

1930

ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

establish that there was an intention to dedicate, an animus dedicandi, and that the user by the public was evidence of such animus and no more. Their Lordships accepted the dictum of Parke B. in *Poole* v. *Huskinson* (1) that "in order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the public is evidence, and no more." If then I am right in saying that this piece of land was laid out as an open space in the popular sense, all the facts in reference to walking across the open space in the direction of either of the diagonals are in favour of the presumption of tolerance by the defendants as against a presumption of dedication, and it seems to me, therefore, that it must follow that no public rights of way have been acquired over this plot of land.

I have already said that in my view prima facie the defendant Corporation, having acquired lands for a particular purpose, and having applied the lands with an intention that that application should be permanent, are not entitled to alter the purpose in question and to apply the land for a different one except under proper statutory authority or except under, it may be, the provisions of a general Act enabling them to do so. This leads me to what I consider to be the real point of this case—namely, the true construction of s. 95 of the Public Health Acts (Amendment) Act, 1907, which I have already mentioned. That section was no doubt passed, or partly passed, to prevent the evil which it was thought arose from the decision of the Court of Appeal in the case of *Attorney-General* v. *Hanwell Urban District Council.* (2) The headnote says (inter alia): "A local authority have no power to apply permanently land which they have acquired for one purpose to another purpose inconsistent with the original purpose, even though the land cannot possibly be required for that original purpose, and they will be restrained from so doing at the suit of the Attorney-General." Sect. 95 provides that [his Lordship

(1) (1843) 11 M. & W. 827, 830. (2) [1900] 2 Ch. 377.

read the section, and continued:] Two questions arise under that section which are, I think, of considerable importance and of some difficulty. In the first place the question arises, What is the meaning of the phrase "not required for the purposes for which those lands have been acquired"? Who is to be the judge of that? Is it a question of fact on which the Court may express an opinion, or is it a question on which the determination of the local authority is to prevail? In answering that question, I think that I have to compare s. 175 of the Public Health Act, 1875. That section, after providing power to purchase, goes on to say: [His Lordship read the section, and continued:] I think that in such a case, either under s. 175 of the earlier Act, or under s. 95 of the amending Act, the local authority, acting in good faith, must be the sole judges of whether the land is no longer required, or is not required for the purpose for which the land was acquired. Of course they must act honestly. I need hardly say that the contrary is not suggested here. But I do not see any ground for thinking that the Court can substitute its judgment upon such a question for the local authority who are given by these Acts wide powers of local government. Accordingly, I must take it that, in the circumstances of this case, it has been determined in good faith by the Corporation that the land in question is not required for the purpose for which it was acquired in 1875. I should add, in reference to that, that it is common ground that the Whitworth Park, which is a very large park provided by the munificence of Sir Joseph Whitworth and his legatees, is immediately to the south of the land, a circumstance which may have led or assisted in leading the Corporation to the conclusion at which they have arrived.

Then comes this question, which, again, I think, is not wholly free from doubt: Does the section enable the local authority, with or without the approval of the Minister of Health, to override either the public or the private rights which may have been acquired by inhabitants in the neighbourhood; in other words, is the contention on behalf of the plaintiff that the words must be construed so as not to take

MAUGHAM J.

1930

ATTORNEY-GENERAL v. MANCHESTER CORPORATION.

away rights, whether public or private, which existed when the statute was passed, one which should prevail here or not? The general rule no doubt is that in the construction of statutes you must not construe the words so as to take away public or private rights, unless you have plain words showing that that was the intention of the Legislature: *In re Cuno.* (1) In the present case, however, we have a section of a very special character. The hypothesis to which the section applies is that lands have been acquired by the local authority for a specific purpose, and it provides, according to the construction which I put upon the section, that in the event of the local authority deciding that the land is no longer required for that specific purpose, then, if there is any fresh purpose for which the lands are required to be used, that purpose must be one approved by the Local Government Board. Further there is a provision that there shall not be any nuisance created or permitted, and that in the case of a number of specific applications of the land which might tend to the damage of the neighbouring owners (e.g., a sewage farm or hospital for infectious disease) the user is only to be allowed if authorized by the Local Government Board (now the Minister of Health) after consideration of all objections made by persons affected. There are thus three safeguards. First, an implied safeguard in that the local authority prima facie are going to do their best in the interest of the inhabitants, and are exercising a public duty; secondly, the safeguard imposed by the necessity of getting the consent of the Minister of Health; thirdly, in certain cases the necessity of holding a local inquiry and considering objections before that consent is given.

I should add that consideration of the sort of case to which s. 95 may apply must lead to the conclusion that, in the normal case, public rights will almost necessarily be affected by the alteration of the purposes for which land of the character in question has been appropriated. For example, it may be an open space, a swimming bath, or a market; in each of these cases people living in the neighbourhood have acquired some

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(1) (1890) 43 Ch. D. 12, 17.

MAUGHAM J.
1930
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ATTORNEY-GENERAL v. MANCHESTER CORPORATION.
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kind of right in relation to the land, while it is being used for that purpose. In the case of a market acquired by a local authority under a special Act, or under a general Act, it may very well be that people have built their shops or have constructed offices in the neighbourhood in reliance on the proximity of the market. It may be that such circumstances have arisen that it is unnecessary in the public interest any longer to retain that market. There have been instances of that kind in the City of London itself. While a market subsists a man has a public right to go there, and subject to the regulations, to buy or sell in the market, and such a right may be very valuable to a neighbouring trader. Is it to be said, in that case, that s. 95 does not apply, because there are public rights which would be interfered with by the alteration of the purposes for which the land has been acquired and their use for some other purpose approved by the Minister of Health ? I quite agree that it is a reasonable presumption that private rights obtained by persons in the neighbourhood cannot be interfered with under s. 95. I think also that public rights of way may be in a somewhat special position; but it does not seem to me necessary to decide what the true conclusion would be had I come to the conclusion that there were public rights of footway across what I have called the diagonals of the space created by dedication : and I would also like to point out, to prevent misconception, that if the space in question had been laid into the streets within the meaning of the section in the Act of 1844 to which I have referred, those rights would, I think, have been saved by the reference in s. 95 of the Amendment Act of 1907 to any "special provision affecting the use of the lands contained in any local Act."

But in the present case the rights of the public have never been defined. I doubt very much whether they are capable of definition. No doubt members of the public were invited to enter the gravelled parts of the ground, and children were invited to play there ; but I think that all of those rights were to some extent precarious. The positions of the shrubberies might have been altered. Conceivably, I think,

MAUGHAM J.

1930

Attorney-General v. Manchester Corporation.

notwithstanding what the Corporation did and the views which they expressed in 1891 and 1893, it might have become necessary to enclose the whole of the space with railings, and to close it at night to prevent it from becoming a nuisance, and possibly to turn the whole space into an ornamental garden to which the public were not admitted. I am not prepared to say that there was anything except possibly the fountain in the middle which might not have been from time to time the subject of alterations or by-laws imposing restrictions on the public consistently with the original intention of the Corporation, as disclosed by the correspondence and minutes of the year 1893.

Accordingly, I think that this is a case where the public rights in the space were of a general character as well as to some extent precarious and uncertain, and I am not prepared, on the true construction of s. 95, to come to the conclusion that rights of this kind cannot be taken away or destroyed as a result of the application of s. 95 of the Amendment Act of 1907.

The conclusion, therefore, to which I come is that, the approval of the Minister of Health under s. 95 having been obtained, the Corporation is authorized to use the land for the purposes so approved, and that the action accordingly fails and must be dismissed.

Solicitors: *Roberts, Riley & Anderson, Manchester; Sharpe, Pritchard & Co., for F. E. W. Howell, Town Clerk, Manchester.*

K. R. A. H.

C. A.
1930
Nov. 25.

WALTON HARVEY, LIMITED *v.* WALKER AND HOMFRAYS, LIMITED.

[1929. W. 2095.]

Contract—Impossibility of performance—Electrically illuminated Advertisement—Erection and Maintenance on Building—Acquisition and Demolition of Building by Local Authority—Implied Condition—Damages—Limits of Assessment—Lands Clauses Acts—Manchester Corporation Act, 1891 (54 *&* 55 *Vict. c. ccvii.*), *s.* 18, *sub-s.* 1—*Manchester Corporation Act,* 1920 (10 *&* 11 *Geo.* 5, *c. xcvii.*), *s.* 11.

The lessees of a hotel entered into two contracts with a firm of advertising agents, under the terms of which the latter were entitled to erect and exhibit, for a term of years, upon the roof of the hotel, electrically illuminated advertisements. An electric sign was duly erected. Before the expiration of the term the local authority, in exercise of its statutory powers, served the lessees with a notice to treat for the purchase of their estate and interest in the hotel, and, ultimately, having acquired the reversion to the lessees' term, took possession, closed the hotel, and began to demolish it. The electric sign was removed by arrangement with the advertising agents, who subsequently commenced an action against the lessees to recover damages for breach of the two contracts :—

Held, that the local authority had acquired the defendants' interest in the premises by compulsion ; that the two contracts did not confer upon the plaintiffs any proprietary interest or estate in the hotel ; and that, as it could not be said that both parties to those contracts had made their bargain upon the footing that if the local authority exercised their powers and took the hotel the contracts were to be discharged, there must be a declaration that the defendants were liable to the plaintiffs for damages for breach of those contracts.

Baily v. *De Crespigny* (1869) L. R. 4 Q. B. 180 distinguished and explained.

Decision of Bennett J., ante, p. 145, affirmed.

Appeal from a decision of Bennett J. (1)

The action was brought to recover damages for an alleged breach by the defendants of two contracts made between the plaintiffs and the defendants. Both contracts were in writing and bore the common seals of the parties and were dated December 31, 1924.

The facts, which were not disputed, are fully stated in the report of the case in the Court below, and also appear from the judgment of the Master of the Rolls. Bennett J.

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(1) Ante, p. 145.

gave judgment in favour of the plaintiffs and directed an inquiry as to damages.

The defendants appealed. The appeal was heard on November 25, 1930.

Archer K.C. and *P. B. Morle* for the appellants.

Grant K.C. and *Charles E. Harman* for the respondents.

The arguments were substantially the same as those used in the Court below.

[The following authorities were referred to: *Baily* v. *De Crespigny* (1); *Taylor* v. *Caldwell* (2); *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (3); *Metropolitan Water Board* v. *Dick, Kerr & Co.* (4); *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (5); *Paradine* v. *Jane* (6); *Matthey* v. *Curling* (7); *Long Eaton Recreation Grounds Co.* v. *Midland Ry. Co.* (8); *James Jones & Sons, Ld.* v. *Earl of Tankerville* (9); *Wilson* v. *Tavener* (10); *Frank Warr & Co.* v. *London County Council.* (11)]

LORD HANWORTH M.R. This case raises a point of some little interest, but the difficulty is not so much to determine what the law is as to determine the exact principles which should be applied to the facts of the present case. The Manchester Corporation, under an Act of 1891, had the powers which are given to local authorities over what may be called temporary or precarious structures. By s. 18, sub-s. 1, of the Manchester Corporation Act, 1891, it is provided: "It shall not be lawful for any person to erect or set up in the city in any place any wooden or other structure or erection of a movable or temporary character . . . . without a license in writing first had and obtained from the Corporation for the erection or setting up of such structure or erection." In the year 1920 another statute was passed called the Manchester Corporation Act, 1920. That was a private Act, but it contained powers enabling the Corporation to take certain portions of their streets for various improvements, one of these being intended to cover the corner of Peter Street and Cooper Street where a large hall would be built, and at the corner of those two streets there stood the St. Peter's Hotel. By s. 11, sub-s. 1, of the Act of 1920 it is provided: "Unless otherwise agreed between the Corporation and any of the persons who at the date of the passing of this Act are the occupiers of the premises hereinafter mentioned the Corporation shall not under the powers of this Act compulsorily acquire the interest of such person and/or require vacant possession of his premises before the 31st day of October, 1925, or before the Corporation are authorised by Parliament to borrow money for the erection of a building under the powers of Part III. (Town hall and municipal buildings) of this Act (whichever shall be the later"). The defendants were at that time the lessees of the St. Peter's Hotel at the junction of the streets I have mentioned, and this s. 11 covered an area including the space on which the hotel stood. The premises referred to are enumerated in sub-s. 2, and we have had our attention called to numbers 37 and 39, which numbers, we are told, embrace the area on which the St. Peter's Hotel stood.

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(1) L. R. 4 Q. B. 180.
(2) (1863) 3 B. & S. 826.
(3) [1916] 2 A. C. 397.
(4) [1918] A. C. 119.
(5) [1915] 3 K. B. 676.
(6) (1647) Aleyn, 26.
(7) [1922] 2 A. C. 180.
(8) [1902] 2 K. B. 574.
(9) [1909] 2 Ch. 440.
(10) [1910] 1 Ch. 578.
(11) [1904] 1 K. B. 713.

Pausing there for a moment, let us consider what was the power of the Corporation under s. 11. They could not compulsorily acquire the interests of any person in those areas before October 31, 1925, and even then the time might be extended, unless the Corporation had, before that time, borrowed the money for the erection of the building under Part III. which enables them to build a town hall and municipal buildings. So that until October 31, it would seem that the owners and occupiers of the premises in that particular area could rest content, conscious that the Corporation could not exercise any compulsory powers against them and that the Corporation could take the premises only by agreement with them.

On December 31, 1924, the defendants entered into two agreements, one of which was merely subsidiary to the other, with the plaintiffs, Walton Harvey, Ld., who are an advertising company with a registered office in London. The defendants agreed to let to the plaintiffs the exclusive right of fixing and exhibiting on the front portion of the defendants' premises, that is St. Peter's Hotel, "an electric sign or signs as shewn and outlined in red on the plan annexed hereto." The principal agreement was to remain in force for a period of seven years from September 29, 1924, with the possibility of renewal at the option of the plaintiffs for a further period of five years upon the same terms and conditions, and, lastly, I must refer to the fact that the plaintiffs were to be at liberty forthwith, after the signing of the agreement, "to enter upon the said premises for the purpose of fixing and erecting wiring illuminating and shewing the said electric sign."

Having regard to the cases to which our attention has been called (*Wilson* v. *Tavener* (1) and *Frank Warr & Co.* v. *London County Council* (2)), I think it may be said that upon the true interpretation of that agreement it did not give the plaintiffs an interest in land or in the premises occupied by the defendants. Taking the agreement as a whole, it was, to use the words of Collins M.R. in *Frank Warr & Co.* v. *London County Council* (3), which are equally applicable to this case, merely one to provide "for the exercise of privileges by the plaintiffs by way of licence, and not to create an interest in land."

When that agreement had been made, the hoarding was put up on which the sign was to be fixed. It was to be fixed with good attachments to parts of the roof and there was to be a right on the part of the plaintiffs to go up and attend to it. They accordingly made use of their rights under this agreement, but in order to do so an application was made for a licence to be granted under the Act of 1891, and that licence was in fact granted on May 6, 1925, that is four months after the agreement. It appears to me quite

(1) [1901] 1 Ch. 578.
(2) [1904] 1 K. B. 713.
(3) 1904] 1 K. B. 713, 720.

clear that a licence was necessary for the purpose. We are told that this hoarding was put up at a cost of 275*l.*, and it appears to me that such a hoarding would certainly fall within the meaning of the words of s. 18 of the Act of 1891, being a structure or erection of a movable or temporary character.

On December 18, 1925, a notice to treat in respect of their interest in the premises was served upon the defendants by the Corporation. The fact that there was this notice to treat indicates, I think, quite clearly to any one who is familiar with the procedure under which these private Acts are obtained that there must have been an original notice served upon the defendants at the time when the Bill, which afterwards became the Act of 1920, was deposited. The defendants would be persons who would have had a right either to oppose the Bill or ask for special treatment under the Bill. I think the learned judge was abundantly justified in holding that the defendants must be deemed to have had knowledge of the terms of the Corporation's Act of 1920, and particularly of s. 11.

On December 18, as I have said, notice to treat was served and the defendants were required to tabulate their claim in respect of their occupation of the premises, and they did so. In that claim they included a sum of 450*l.*, which was a sum measured by 4½ years purchase of rent payable in respect of the sign—namely, 100*l.* per year. That fact, however, can be regarded as completely irrelevant to any question we have to deal with at the present time. What rights the defendants had against the Corporation, what sums they were paid by the Corporation in respect of those rights, do not in any way affect or alter the rights which the plaintiffs might have against the defendants.

In January, 1926, the representatives of the parties on either side came to an agreement that the compensation to be paid to the defendants by the Corporation was to be 3850*l.*, and ultimately an agreement was entered into dated April 19, 1928, whereby the defendants agreed to sell their leasehold interest at that figure and to complete on a three months' notice to do so. Matters went on as they had done previously and the plaintiffs continued to pay rent for this hoarding down to December 25, 1928.

On March 26, 1929, notice was given by the Corporation withdrawing the licence for the hoarding. It was a three months' notice, and therefore it would be complete by June 25, 1929. On March 12 the Corporation gave notice to complete the purchase, and that, therefore, would have to be completed on June 12.

On June 21, 1929, the writ in this action was issued. It set out the terms of the agreement now before us, and referred to the fact that a notice had been given to the plaintiffs to remove the electric sign, and "as a result of such notice the plaintiffs have been since the 9th July 1929 unable to enter into any agreement for the letting of the said electric sign and have thereby suffered and are suffering and will continue to suffer damages for which the defendants are responsible." The date is a curious one. It is subsequent to the issue of the writ and therefore obviously refers to some matters which have taken place right down to July 9 under the rule whereby damages can be estimated down to a later date than the issue of the writ. But it is not quite easy to see why July 9 should be fixed.

To complete the facts, on September 25 there was a surrender made on terms by the defendants to the Corporation. The Corporation took possession and in January, 1930, they in fact removed this hoarding and the electric sign upon it.

The plaintiffs then brought their action before Bennett J., who held in favour of the plaintiffs and ordered an inquiry as to what damages the plaintiffs had suffered. The defendants attempted, before Bennett J., to excuse themselves by saying that what had happened, and their difficulty in carrying out the terms of the agreement of December 31, 1924, arose from circumstances which had supervened and for which they were not responsible. They contended that it was the Corporation who had withdrawn the licence, that it was the Corporation who had taken possession of the defendants' premises under compulsory powers, and that the failure of the defendants to carry out the agreement was wholly due to this compulsion exercised by persons who had a higher—namely, a statutory—authority over them. The learned judge has held, and I agree with him, that the hotel was taken under compulsory powers. It was not possible for the defendants to dispute the right of the Corporation to give them notice to treat. All that followed, whether it was carried out by an actual fight or by agreement between surveyors, was the working out of compulsory powers.

The learned judge also held that the agreement did not confer any proprietary right upon the plaintiffs but was in the nature of a mere licence. I also agree with him upon that. But we still have to deal with the question whether or not this is one of those cases in which one can apply the principle which is laid down in *Baily* v. *De Crespigny* (1), that is to say, that where some higher authority has supervened and has prevented the completion of the terms of an agreement, such failure to perform the agreement is not to be imputed to one of the parties, but is due to what has subsequently made performance impossible, with the result that the defaulting party is not to be responsible in damages to the other party. I agree with the observation that was made by Mr. Grant that *Baily* v. *De Crespigny* (1) is to be taken as having a rather wider signification than it was interpreted as having by Bennett J. I think the passage he cited from *Metropolitan Water Board* v. *Dick, Kerr & Co.* (2) and the speech of Lord Dunedin make that quite plain. In my opinion *Baily* v. *De Crespigny* (1) is to be taken not merely as a case of a statutory assignee being forced upon a person who had entered into a covenant against assignment, but as an illustration of something being taken away from the control of a party to the contract which has interfered with his carrying out the terms of his contract.

Now comes the question whether or not we should treat this case as one in which the parties had contracted on the implication on both sides that there should be a continued

(1) L. R. 4 Q. B. 180.

(2) [1918] A. C. 119.

existence of the St. Peter's Hotel whereon this sky sign was to be. Lord Reading C.J. in *In re Shipton, Anderson & Co. and Harrison Brothers & Co.'s Arbitration* (1) put the case quite clearly in this way. He cites these words from the judgment of Blackburn J. in *Taylor* v. *Caldwell* (2): "Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Lord Reading then adds: "It is to be observed that in that rule stress is laid upon the perishing before the breach of the thing which is the foundation of the contract," and goes on to refer to a passage in the judgment of A. L. Smith M.R. in *Nickoll* v. *Ashton*, which is in these words (3): "The true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing ceasing to exist without the defendants' default."

I will refer to one other case: *F. A. Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (4) I agree respectfully with what Lord Dunedin said in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (5) that the principles which are referred to in the *Tamplin* case (4) by all the judges are the same, the difference being in their application of them

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(1) [1915] 3 K. B. 676, 682.
(2) 3 B. & S. 826, 833.
(3) [1901] 2 K. B. 126, 132.
(4) [1916] 2 A. C. 397.
(5) [1918] A. C. 119, 127.

C. A.
1930

WALTON HARVEY, LD.
v.
WALKER AND HOMFRAYS, LD.

Lord Hanworth M.R.

to the particular facts. Lord Haldane, although he made a dissenting speech, may be taken to have declared the principle which all the noble Lords were endeavouring to apply (1) —namely, that "When people enter into a contract which is dependent for the possibility of its performance on the continued availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved. The contingency which has arisen is treated, in the absence of a contrary intention made plain, as being one about which no bargain at all was made."

Now is it possible to apply that principle to the present case ? As I have said, and the learned judge has found, it would appear that the defendants were aware of the fact that their premises might be taken under the statutory powers in the Act of 1920, s. 11. The plaintiffs had no such knowledge, nor can knowledge be imputed to them. But there seems to be a difficulty in saying that the parties impliedly agreed that there should be a continued existence of the St. Peter's Hotel as the basis of their contract, for the defendants must have known that while they had a sure and certain continuance of their rights until October 31, 1925 (that is for at least some ten months beyond the date when the agreement was made), there was some risk after that date. They could have provided against that risk, but they did not. The Court is not very ready to imply subsidiary additions to an agreement made between parties and, in the absence of such implication, the law as stated in *Paradine* v. *Jane* (2) still applies. The parties must, if they desire to be safeguarded against subsequent contingencies, provide for them in their agreement. If they do not do so, but have entered into a contract in terms which are absolute, those terms must be carried out unless in the somewhat rare cases where it can be found that there was an implied understanding on both sides that the basis of the contract was the continued existence of an essential matter to the contract. Having regard to the knowledge on the part of the defendants,

(1) [1916] 2 A. C. 397, 406. (2) Aleyn, 26.

the terms of the contract and the fact that the defendants were sure of their possessory rights for a certain time only, it does not seem to the Court to be possible to apply the principles illustrated in *Baily* v. *De Crespigny* (1) and the subsequent cases which have been referred to which arose during the war.

It would therefore seem that the learned judge was right in saying that there must be judgment for the plaintiffs. He then ordered an inquiry as to damages. I desire to say a word or two about that. I understand that for the purpose of excusing the calling of a witness it was admitted that, if there was a liability for the continuance of the agreement and it was not to be deemed to have been put an end to, there would be some damage, but that did not exclude the right on the part of the defendants to take all points as to the uncertainty of the contract as it stood even if it was not put an end to under the principles of the cases to which I have referred. Mr. Archer appears to us to be in no way restricted in raising points on the question of damages or the measure by which those damages are to be ascertained.

How does the matter stand ? for it does not appear to be right to send this case down to be inquired into by the Master without giving him some indication of the limits within which damages are possible. First of all, Mr. Grant has admitted that so long as the agreement is to be deemed to be in existence and current for the purpose of damages, so long the plaintiffs must continue to pay rent under the agreement, that rent being 100*l.* a year. They have paid rent down to December 25, 1928, and no more. Apparently no interference took place with the user of the sign down to some time in June or July of 1929, but in March of 1929 notice to determine the licence was given expiring at the end of June or early in July. So that without any action, positive or negative, on the part of the defendants, the possibility of continuing the sign had ceased by some date either at the end of June or early in July of 1929. From and after that time it would appear that whatever be the duty on the part of the defendants, however much they had undertaken to allow the sky sign to remain, the condition which was precedent to the exercise of their rights under the agreement had been withdrawn—namely, the licence—and it must be clear that the plaintiffs, who are advertising agents, and who have an office in Fleet Street, must have known certainly from their experience in London and, I should think in almost every other town, that for this sort of thing a licence from the local authority is necessary. One may impute knowledge to the defendants only of the Act of 1920, but I think one must impute to the plaintiffs an even more complete knowledge that such powers as existed and were given to the Corporation under the Act of 1891 are powers which belong to almost every local body. Upon the facts, therefore, it would seem that the plaintiffs might have some claim if and so far as they have not exercised or were not able to exercise their rights under the agreement, but the working out of the agreement had become impossible by the withdrawal of the licence from and after June or July, down to which date it would appear that the plaintiffs had had full opportunity of exercising their right to exhibit this electric sign. The plaintiffs have not paid rent for the preceding six months, so that in taking an account of the debit and credit items, it would seem that the plaintiffs must be debited with the sum of 50*l*. They had, during the whole of that time, the opportunity of using the sky sign, and from and after that date, either in June or July, the disability to use it arose not from default on the part of the defendants, but from the withdrawal of the licence. It is impossible, as we have not gone into the whole question of damages, to come to a conclusion whether that leaves any sum due to the plaintiffs. It may, or it may not. Bennett J. has ordered an inquiry and that can stand, but the Master who is charged with the inquiry will take into account the observations that have been made and see whether, within the limits that I have indicated, there are any damages payable to the plaintiffs.

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(1) L. R. 4 Q. B. 180.

For these reasons, the appeal will be dismissed with costs and the matter will take its course upon the inquiry as to damages.

ROMER L.J. I agree. The defendants here are relying upon a principle that has been established by numerous authorities and as to which at the present date there can be no doubt whatsoever. I am content to take the statement of the principle from the judgment of Hannen J. when delivering the judgment of the Court of Queen's Bench in *Baily* v. *De Crespigny*. (1) What he said was this (2): "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." That being the principle, I do not myself obtain any assistance in deciding this case from a consideration of the various authorities in which the principle has or has not been applied. Each case must depend on its own circumstances.

Now the circumstances of the present case are that the impossibility of further performance by the defendants of their contract arose from the exercise by the Corporation of compulsory powers of purchasing the hotel. Those powers, however, had been conferred by an Act of 1920, four years before the date on which the plaintiffs and the defendants entered into the contract or contracts in question. I agree with Bennett J. and the Master of the Rolls that the defendants must have known of the existence of the Act and, therefore, of those compulsory powers. In those circumstances, I find myself quite unable to come to the conclusion that the exercise of those compulsory powers cannot reasonably be

(1) L. R. 4 Q. B. 180.

(2) L. R. 4 Q. B. 185.

supposed to have been in the contemplation of the contracting parties when the contract was made. It seems to me rather that the exercise of those compulsory powers was an event which might have been anticipated and guarded against in the contract.

I would further point out that if the defendants are right, we have to imply a term in the contract which would put an end to the lease of seven years on the happening of this particular event; in other words, we should have to treat the defendants as granting to the plaintiffs a lease of this right of placing the electric sign on the top of the roof for a term of seven years or until the Corporation should exercise their compulsory powers of acquiring the property in question. Supposing we did imply such a term, it is quite clear the defendants would not have been able to claim from the Corporation compensation for the loss of rent during the remainder of the term, because there would be no remainder of the term to consider. Yet I find, as was mentioned by the Master of the Rolls, that the defendants, when they are claiming compensation from the Corporation, claim a sum which did represent the loss to them of rent during the remainder of the term, treating that term as an unconditional one. For these reasons, I agree that this appeal should be dismissed with costs.

I only add this, that on the question of damages, I agree with what has been said by the Master of the Rolls and have nothing to add to it.

EVE J. I have arrived at the same conclusion. The sole object of this action was to recover damages for the alleged breach on the part of the defendants of two agreements of 1924 and the breach assigned was not the compulsory acquisition by the Manchester Corporation of the premises in question and the putting an end thereby to the easement which the plaintiffs were enjoying over it, but a voluntary agreement entered into, according to the pleader, in or about the month of February, 1929, for the sale by the defendants to the Manchester Corporation of the hotel for the purposes of demolition. If that had been established, undoubtedly that would have given a cause of action against the defendants for voluntarily putting an end to the agreement and thereby disqualifying themselves from carrying out their contract. But at the trial, when the facts were ascertained, it became quite clear that so far from the defendants having voluntarily disposed of their hotel in February, 1929, the Manchester Corporation had entered into a contract to purchase it by the compulsory notice given in December, 1925, and accordingly the plaintiffs had to put their case in this way, that whether it was in fact the voluntary sale alleged in the statement of claim, or whether it was the compulsory sale brought about by the notice to treat, they were equally entitled to damages. That, I think, is the result of the decision of the learned judge and of the facts as they have been disclosed. Upon that, what is the allegation with regard to damages? The plaintiffs' original case being that there was a voluntary sale in 1929, they then say that in the next month the Corporation, in view of what was intended to be done consequent upon the purchase, gave us notice withdrawing the licence, and the effect of that notice was that since July 9 the plaintiffs have been unable to enter into any agreement for the letting of the sign "and have thereby suffered and are suffering and will continue to suffer damages for which the defendants are responsible." One must see what the position was prior to the date from which the plaintiffs allege that damage has been suffered. The hotel was in course of being demolished; that is to say, when the three months expired the Corporation were entitled to enter into the premises, and they had, in fact, entered in September and ultimately removed this sign, but the only damage which had accrued down to the time the statement of claim was delivered was such damage as had arisen since July 9, 1929, and in making the inquiry as to damages the Master will, no doubt, have regard to the fact that at that date a considerable arrear of rent was due from the plaintiffs to the defendants and that at that moment the defendants were not responsible for the

C. A.
1930
WALTON HARVEY, LD. v. WALKER AND HOMFRAYS, LD.
Eve J.

fact that the sign was no longer available. The notice which the plaintiffs themselves allege was the cause out of which the damage arose was the notice given by the Corporation. Having bought this hotel to pull it down, and having withdrawn the licence in order to enable them to do so, I hardly think the Master will believe that the Corporation were likely to renew the licence. It seems to me the more one looks at it, the more remote is the possibility of any substantial damage having been sustained by the plaintiffs in this case. I should like to express my regret that, as this was an action merely for the purpose of ascertaining damages, the matter was not disposed of at the trial. It is true that in many cases in the Chancery Division, where there are legal questions to be discussed and where, as a result of that discussion, an inquiry may be directed as to whether damages have been sustained, an inquiry in Chambers may be necessary; but in a common law action for breach of an agreement I should be sorry to think that a judge of the Chancery Division is incompetent to assess the damages, and expense would have been avoided if that course had been adopted here.

Appeal dismissed.

Solicitors for appellants: *Church, Adams, Tatham & Co. for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitors for respondents: *Stanley B. Worth.*

W. I. C.

In re LLOYDS BANK, LIMITED.

BOMZE AND LEDERMAN *v.* BOMZE.

[1929. L. 2630.]

MAUGHAM J.

1930
Oct. 23, 24, 28, 29; Nov. 11.

Gift—Undue influence—Intended Marriage—Dowry deposited before Marriage in joint names of intended Spouses—Agreement providing for its Application after Marriage—Withdrawals from Account before Marriage—Influence of intended Husband—Married Women and intended Wives.

An agreement of May 6, 1929, between B. and L., who were betrothed, provided that L. should deposit at a bank, in her own name and B.'s, the sum of 4000*l.*, to be re-deposited upon the marriage in a current account in their joint names, and to be used in paying off a mortgage on B.'s premises and in buying him a practice. The amount of the mortgage was stated to be about 1200*l.* The agreement had been drawn up on the instructions of L.'s brother, who had provided the 4000*l.* as her dowry. Despite the terms of the agreement, sums were withdrawn before the marriage, which took place on June 16. On May 15 B. and L. withdrew 1000*l.*, with which the practice was bought, and on June 5 they withdrew 2350*l.* They also withdrew other sums at later dates. B. had the money, and L. signed documents authorizing the withdrawals. The marriage was unhappy, and the parties separated on September 27. There was then only the sum of 150*l.* in the joint account, B. having had 3850*l.* At the date of the agreement he owed 2000*l.* to his bank secured by charge on his premises, a fact which he had not told L.'s brother. In an action by L. and her brother to recover the money from B., and asking that the agreement of May 6, 1929, should be set aside or rectified, on the ground that L. was induced by B.'s undue influence to sign the documents authorizing the withdrawals:—

Held, that the agreement must stand, but that the doctrine of *Huguenin* v. *Baseley* (1807) 14 Ves. 273 applies to the relation between persons engaged to be married; that it had not been established that the sum of 2000*l.*, part of the 2350*l.*, withdrawn from the joint account, was a proper gift to the defendant; and that the plaintiffs were entitled to judgment for 1000*l.*, half of the 2000*l.*

Cobbett v. *Brock* (1855) 20 Beav. 524; *Lovesy* v. *Smith* (1880) 15 Ch. D. 655; and *Page* v. *Horne* (1848) 11 Beav. 227 followed.

Howes v. *Bishop* [1909] 2 K. B. 390 distinguished.

ACTION.

On May 5, 1929, the plaintiff, Fanny Bomze (then Fanny Lederman), became engaged to be married to Marks Bomze, a medical practitioner (hereinafter called "the defendant"). On the next day she and the defendant signed a document reciting an agreement that she should place the sum of 4000*l.*

on deposit at a bank in their joint names, and providing that that sum should be re-deposited on current account in their joint names after marriage, and applied in paying off a mortgage on the defendant's premises and buying him a practice. The money had been provided by the plaintiff, Alfred Lederman, a brother of the plaintiff, Fanny Bomze, as her dowry, and was placed forthwith in a joint account. There were substantial withdrawals before the marriage, which took place on June 16, 1929, and proved unhappy. The plaintiff, Fanny Bomze, left the defendant on September 27, by which date the defendant had had 3850*l.* out of the 4000*l.*, and by this action the plaintiffs sought to have the document of May 6, 1929, set aside and cancelled, and to recover the money from the defendant, on the ground that he had obtained it by using undue influence over the plaintiff, Fanny Bomze, to induce her to sign the documents authorizing the withdrawals.

The facts are fully stated in his Lordship's considered judgment.

Archer K.C. and *Danckwerts* for the plaintiffs. The document of May 6, 1929, is not binding on the plaintiffs. It was signed by the plaintiff, Fanny Bomze, before she married the defendant, during her engagement to him. He used undue influence to induce her to sign it, and it ought to be, if not set aside, at least rectified by making the defendant trustee for the plaintiff, Fanny Bomze, of the money and of all property and funds from time to time representing it. She was not separately advised before signing the document, and also she did not understand any of the documents which she signed to authorize withdrawals from the account.

Busse for the defendant. As to the 2350*l.* there is evidence that Mrs. Bomze had independent advice; her brother, Mr. Alfred Lederman, was advising her. On the authorities it cannot be said that she was induced by undue influence to sign the cheque, or that she did not understand what she was doing. The first cheque drawn, for 150*l.*, was according to her, for household expenses, and another, for 350*l.*, was for a motor car. [He referred to *Howes* v. *Bishop* (1) and *Bank of Montreal* v. *Stuart*. (2)] The money never belonged to Mrs. Bomze; it was given to the defendant outright on his marriage with her. In the agreement of May 6, 1929, not a word is said about the money being returned to the wife except in the event of the marriage not taking place, and the evidence shows that it was expressly agreed at a family gathering that the money should belong to the defendant.

Archer K.C. in reply. There is something in the shape of an agreement, but in so far as it is not conclusive, the Court must, on the evidence, draw the proper inference as to whether there has or has not been a gift. If one person transfers money to another without consideration there is a resulting trust in favour of the donor, unless it can be shown that a gift was intended: *Caton* v. *Rideout*. (3) If it is not true that this was a gift, there is no evidence of the satisfactory expenditure of these moneys.

Cur. adv. vult.

Nov. 11 MAUGHAM J. In this action the plaintiffs, Fanny Bomze and her brother, Alfred Manuel Lederman, are suing the husband of the first-named, Dr. Marks Bomze, with a view to recovering a sum of 4000*l.*, or some part of that sum, provided by Mr. Alfred Lederman as a dowry for his sister upon her marriage to Dr. Marks Bomze.

The circumstances of the case are, to say the least, unusual. The parties are of Jewish religion and race. Sides have been taken by the two families; and there is a strong conflict of evidence between the relatives of Mrs. Bomze and the relatives of Dr. Marks Bomze. The true construction and effect of a document dated May 6, 1929, executed prior to the marriage presents some difficulty, and the questions of law involved are not entirely free from doubt. I will endeavour to state, in the first place, my findings as to the true facts and circumstances, prefacing my observations with the remark that, the marriage having taken place on June 16,

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(1) [1909] 2 K. B. 390.
(2) [1911] A. C. 120.
(3) (1849) 1 Mac. & G. 599.

MAUGHAM J.
1930
LLOYDS BANK, LD., *In re.*
BOMZE AND LEDERMAN *v.* BOMZE.

1929, the parties separated some three and a-half months afterwards, at the end of September, and have not lived together since. No separation deed has been entered into nor any proceedings commenced for a judicial separation, and since the separation no sum has been paid by Dr. Marks Bomze for the support of his wife.

Miss Fanny Lederman, as Mrs. Bomze was before her marriage in April, 1929, was a young woman aged twenty-seven, living with her sister, Mrs. Sherman, at 35 St. John's Wood Road, London, N.W., which was the sister's house. Her father and mother were dead, her father having died intestate leaving a very small amount of property; and it appears that her brother, Mr. Alfred Lederman, considered that it fell to him to make arrangements for the marriage of his sister and to provide a dowry. Mr. Alfred Lederman has a business in the sale of Swiss watches. He is a man of both means and intelligence and has a considerable knowledge of the world. He mentioned incidentally that he had been seven times round it. It was apparently known in Jewish circles that Miss Fanny Lederman would have a handsome dowry. At any rate, in April, 1929, a matrimonial agent or marriage broker named Frishman approached Mr. Alfred Lederman on behalf of Dr. Bomze and inquired what Miss Lederman's dowry would be; and he was informed that it would be the sum of 4000*l.* An appointment was made for Dr. Bomze to go to Mr. Alfred Lederman's office, and a discussion took place in relation to the question of a possible marriage between Dr. Bomze and Miss Lederman. Dr. Bomze was not discouraged by Mr. Alfred Lederman and called again. The latter naturally made inquiries with regard to the position of his prospective brother in law, and I find that he was told by Dr. Bomze that he had been in practice at 111 Cannon Street Road, E., since he obtained his qualifications, some eighteen months previously, that he had a gross income of some 800*l.* a year from his practice, but that he was contemplating the purchase of another practice which would give him an income of, altogether, about 1500*l.* to 1600*l.* a year. He required money, however, to pay for such a practice. He was the freehold owner of his residence and surgery subject to a mortgage, the amount of which was stated to be 1200*l*. or 1300*l*. As the result of the conversations which took place Mr. Alfred Lederman introduced Dr. Bomze to Miss Lederman on May 2, 1929 (or it may be a day or two previously), and, of course, as a prospective suitor to her hand. Mr. Alfred Lederman naturally said nothing to his sister as to the way in which Dr. Bomze had come upon the scene. After three or four visits Dr. Bomze proposed marriage to Miss Lederman on May 5, and she accepted him. On the same day there was a gathering of the two families at 35 St. John's Wood Road. It was desirable that the two families should meet and it was also desired to talk about and to fix the date of the marriage; but it was not intended at such a party to have a financial discussion on the subject of the dowry. No doubt all the Bomze family had been told that Dr. Bomze's bride was to have the substantial sum of 4000*l*. Mr. Alfred Lederman went with his elder brother, Mr. Hyman Lederman; Dr. Bomze and Miss Lederman were there; Dr. Bomze's father, his brother, Mr. Simon Bomze, who describes himself as the business man of the family, and his brother-in-law, Mr. Maurice Berkeley, a tobacconist and hairdresser, were also present. Mrs. Sherman was there as hostess. Some conversation took place as to the proposal to purchase a better practice for Dr. Bomze. Mr. Alfred Lederman, who was living in Down Street, W., was desirous that the practice to be bought should be in the West End, as he thought his sister would live more happily in that district; but that proposal was turned down, because Dr. Bomze had already got a connection gained in his existing practice in the East End and did not wish to give it up. The amount of the dowry was mentioned, and I think all parties assumed that the new practice would be paid for out of the dowry; but I do not credit the statements made by and on behalf of the defendant that the pecuniary position of Dr. Bomze and his debts and liabilities and the alleged smallness of his income were discussed on that occasion at all. The two families did not trust each other.

Mr. Alfred Lederman was not impressed by the relations of Dr. Bomze: I am convinced that nothing was said which might have further disillusioned him. On the other hand, Dr. Bomze and in particular Mr. Simon Bomze, were very desirous that they should see the colour of Mr. Alfred Lederman's money before the matter proceeded further, and a suggestion was made that the 4000*l.* should be placed on deposit in the joint names of the intended spouses. This presented no difficulty, since Mr. Alfred Lederman was ready with the cash; but, being a business man, he thought it would be wise to have something drawn up to show that the money would have to be repaid to his sister if the marriage was not solemnized before the end of the year.

On the following morning Mr. Simon Bomze and the brother-in-law, Mr. Maurice Berkeley, called upon Mr. Alfred Lederman at his office, and suggested that a short agreement should be drawn up at once and that the 4000*l.* should be deposited in the joint names of the future spouses. Mr. Alfred Lederman made no objection. He rang up his own solicitor but found that he was engaged. Another solicitor whom he knew, a Mr. Moss, was available. Accordingly Mr. Alfred Lederman took Mr. Simon Bomze and Mr. Maurice Berkeley to Mr. Moss's offices. Mr. Alfred Lederman went in alone and asked Mr. Moss to draw up an agreement to carry out what was intended. This was done at once, while Mr. Bomze and Mr. Berkeley were waiting outside and taking some refreshment. Mr. Moss caused two copies of the agreement to be made in a few minutes, and Mr. Alfred Lederman left the office with the two copies and joined the members of the Bomze family. After consideration the agreement was found to be satisfactory to them, and later in the day the two copies were signed by Dr. Bomze and by Miss Lederman in the presence of Mr. Simon Bomze and of Mrs. Sherman.

The agreement is certainly in an unusual form. It is in the following terms: "Agreement made the sixth day of May one thousand nine hundred and twenty nine between Marks Bomze of 111, Cannon Street Road, London, E. 1, Medical Practitioner (hereinafter called 'the husband') of the one part and Fanny Lederman of 35, St. John's Wood Road, London, N.W., Spinster (hereinafter called 'the wife') of the other part. Whereas: (*a*) A marriage has been agreed upon and is intended to be solemnized on the Eighteenth day of July next between the husband and the wife and it has been agreed that the wife shall deposit the sum of Four thousand pounds at Lloyds Bank, 210, Commercial Road, London, E. 1, in the joint names of the husband and wife to be dealt with as hereinafter appearing Now it is hereby agreed as follows:—1. The said sum of Four thousand pounds shall after the solemnization of the said marriage be re-deposited at the said Bank on current account in the names of the husband and wife. 2. Operations on the said current account shall take place by cheques drawn by both the husband and the wife. 3. The said sum of Four thousand pounds is intended to be applied as follows:—(*a*) To repay an amount now secured by mortgage over premises occupied by the husband as a residence and surgery at his above mentioned address. (*b*) To purchase a medical practice for the husband. 4. If the said marriage be not solemnized on or before the thirty-first day of December one thousand nine hundred and twenty nine the said sum of four thousand pounds shall be repaid to the wife freed and discharged from all trusts." That agreement is duly signed.

It will be noted that the marriage at that time was intended to be solemnized on July 18, but that the 4000*l.* was to be placed on deposit at Lloyds Bank in the joint names of the prospective husband and wife at once, and that was immediately done by Mr. Alfred Lederman. Clearly it was not intended that any part of the 4000*l.* should be drawn out before the intended marriage, since the first clause provides that after the marriage the sum in question was to be redeposited at the same bank on current account in the names of Dr. Bomze and Mrs. Bomze. Clause 3 of the agreement shows merely what was intended at the time to be the application of part of the 4000*l.* after the marriage. It was contemplated that there was to be a repayment of the amount secured on mortgage over the premises occupied by the husband, and that a medical practice should be purchased for the husband.

In my opinion, notwithstanding this statement of intention, neither of these things could be done after the marriage and after the 4000*l*. was placed on current account in the names of the husband and the wife without the consent of the wife. Probably these three clauses were not regarded as of first-rate importance by Mr. Moss when drafting the document. The important matter from the point of view of his client is contained in clause 4, which provided that, if the marriage had not taken place by December 31, 1929, the sum of 4000*l*. was to be repaid to the wife freed and discharged from all trusts. The statement of claim asks that this agreement should be set aside and cancelled or in some way rectified. No evidence has been tendered to support any such claim. The agreement was executed by parties who were of full age, and by Miss Lederman at the suggestion of her brother who had himself had the document drawn up. In these circumstances the document must stand. The marriage did take place and, if nothing had intervened, the sum of 4000*l*. would have been placed on current account in the names of the spouses and operations on that account would have taken place by cheques drawn by both of them. The agreement was, however, departed from under the circumstances I am about to state, with the result that at the date of the marriage the amount left on deposit was only 650*l*. in lieu of 4000*l*.

Dr. Bomze's real position at the date when he suggested marriage with Miss Lederman was by no means a satisfactory one. He owed a sum of 2000*l*. to Lloyds Bank, a sum which he had borrowed in the year 1927 and had not been able to repay. He alleges that he also owed a sum of 1600*l*. to his father,who had provided that sum to set up his son in business as a doctor. His income as a doctor, as he testified in the box, amounted to the sum of 8*l*. a week gross. His expenses, as he alleged, exceeded that sum, and he was receiving at the time further assistance from his family. All this he swore was explained to Mr. Alfred Lederman; and his brother Mr. Simon Bomze corroborated his evidence. I do not however credit these assertions, and I prefer to believe the more probable statements of Mr. Alfred Lederman, who appeared to me to be a witness of truth. Stated in bald terms Dr. Bomze's evidence amounted to this, that he was insolvent in May, 1929, and required nearly 4000*l*. to pay his debts and another sum to purchase a practice on which he could live. He was willing to marry only upon the terms that he received 4000*l*. without any condition whatever. All this, he says, he explained to Mr. Alfred Lederman, who knew that Dr. Bomze's price was 4000*l*. Why an affectionate brother should provide 4000*l*. in order to induce an insolvent and hitherto unsuccessful doctor twenty-seven years old to marry his sister was not explained to me. Dr. Bomze did not even pretend to be fond of his future wife. It was an arranged marriage. The physical attractions of the lady were certainly not less than those of the proposed husband—an observation I think it right to make only because of certain suggestions made by Dr. Bomze's counsel. Mr. Alfred Lederman was anxious to provide his sister with a husband of reasonable means. He took the precaution on May 6 of asking Dr. Bomze to write him a letter stating his position, and on the following day he received a letter in these terms: "Dear Alfred, In answer to your enquiry the freehold of the property, the buying out of the leaseholder, alteration and addition to premises and the fitting and equipment of the surgery, furnishing, etc., and drugs, instruments, etc., various legal and lawyers' expenses and charges involved a capital outlay of approximately 3500*l*. Yours faithfully, Marks Bomze." Parenthetically I would observe that Dr. Bomze in the box alleged that this letter was written to show that he was in debt to the extent of 3500*l*. When it was pointed out that the letter says not a word about debts, he thought fit to say that the letter was "dictated" to him by Mr. Alfred Lederman. When the envelope in which the letter came by post from Cannon Street Road, E., to Down Street, W., was found and produced, his only resource was to attempt to explain the word "dictated." This incident was one of a number of circumstances which led me to the conviction that

Dr. Bomze was not to be relied on. Obviously, the letter was not written to show debts, but to enumerate assets. The truth, as I find it, is that Dr. Bomze was exceedingly anxious to secure a wife with 4000*l.*, and that he threw dust in the eyes of the brother who was to provide it, that he exaggerated his income as a doctor, that he mentioned a "mortgage" on his surgery, perhaps because he might have been asked to produce the deeds, but minimized the amount due, and that he was entirely silent as to the amount due or alleged to be due to his father.

I will now return to the events that followed the execution of the document of May 6. I gather that Dr. Bomze's family were unwilling to make further advances, and accordingly, in order to provide for the expenses connected with the marriage and the honeymoon, it was necessary for Dr. Bomze to obtain part of the 4000*l.* on deposit in his name and in that of Miss Lederman. Further he desired, and I think this was a reasonable desire, to conclude, before the marriage, a bargain in relation to the proposed purchase of a practice which he had been negotiating with a Dr. Naphtali Berman at the sum of 1000*l.* The question of the purchase of the practice at 1000*l.* was mentioned to Miss Lederman and she mentioned it to her brother Mr. Alfred Lederman. It is not in dispute that both the lady and her brother well understood that the 1000*l.* was required for the purchase of the practice; and on May 15, 1929, nine days after the agreement of May 6, the sum of 1000*l.* was drawn out of the deposit account by Dr. Bomze and Miss Lederman and was deposited for the purpose of paying the 1000*l.* to Dr. Berman. On the same day Dr. Bomze entered into a provisional agreement with Dr. Berman.

On June 5, 1929, there was a much more serious withdrawal. This was a withdrawal of the sum of no less than 2350*l.* from the deposit account; and conflicting evidence has been given with regard to this withdrawal which it has been my duty to consider. Mr. Alfred Lederman testifies that after the 1000*l.* was drawn out he was asked by Dr. Bomze to consent to the withdrawal of a further 350*l.* before the marriage. Dr. Bomze alleges that the request was for a consent to the withdrawal on June 5 of 2350*l.* It is clear that Miss Lederman would not before the marriage have consented to any withdrawal without her brother's approval.

It may be useful to consider her brother's position as regards the 3000*l.* remaining on deposit on June 4. The marriage might conceivably not take place. Was he to take the risk of being able in that event to recover 3250*l.* from Dr. Bomze ? I am satisfied that he was not told and did not know that the latter owed 2000*l.* to his bank secured by mortgage or charge ; but, if Mr. Alfred Lederman as a business man had known that fact and had been asked to assent to so large a charge, or even a lesser charge, being paid off before the marriage took place, I think it is almost certain that he would have proposed that the mortgage should be transferred to his sister, and I do not see how that could have been objected to, especially having regard to the fact that the agreement of May 6 had already been departed from by the purchase of a practice for Dr. Bomze for 1000*l.* before the marriage.

But after all the matter is one of credibility of the two witnesses, and I accept the evidence of Mr. Alfred Lederman and do not believe that of Dr. Bomze. What the prospective bride was told, I am not so sure. She has been ill since the breaking up of her home, and her recollection is not to be relied on. True it is that she went with Dr. Bomze to the bank on June 5 and signed a receipt for 2350*l.* The bank manager was called and gave evidence to show that from his point of view the transaction was quite a normal one. Miss Lederman does not seem to have said anything while in his room ; but she was there and signed the authority and as a matter of law of course she is bound by the authorization given to the bank. Whether as between her and her prospective husband the mere drawing out of the money must be taken to establish a gift by her to him is quite another matter.

The marriage took place on June 16, 1929, having been expedited by a month for the reason that Mr. Alfred Lederman thought that he would have to go abroad again on business before the date originally fixed. In the meantime Dr. Bomze had paid 2000*l.* to the bank, 100*l.* to the marriage broker, 126*l.* for the engagement ring, 109*l.* to Cook's for the expenses of the honeymoon tour, and various sums for synagogue fees and other expenses of the wedding.

On their return Dr. Bomze again wanted money, and he obtained the signature of his wife to an authority to withdraw from the deposit 150*l.* on August 2. She knew, however, that this was for current expenses. The marriage was not a happy one and there were numerous quarrels; but as late as September 25 it seemed likely that things would settle down, for on that date Mrs. Bomze joined with her husband in signing an authority to the bank for the withdrawal from the deposit account of a sum of 350*l.* The greater part of this sum was intended to be applied in the purchase of a motor car which Dr. Bomze thought would be useful to him in his practice, and it was so applied. The car would, of course, have been used by the wife at times when Dr. Bomze was not wanting it; and according to him she chose it. He contends that the car is his, not, I observe, because it was given to him, but because the whole 4000*l.* or, rather, the remnant of that sum, became his on the marriage.

Two days later Mrs. Bomze was, according to the evidence of herself, her sister and her two brothers, turned out of the house by Dr. Bomze. This is denied by Dr. Bomze. He, however, seems to have thought that his conduct to his wife needed some excuse, for, by his instructions, his counsel cross-examined Mrs. Bomze with a view of showing that she was suffering from a malformation or a disability which had rendered the consummation of the marriage impossible. I will say nothing as to the good taste of this suggestion on the part of a husband who was refusing to restore a sixpence of the wife's dowry, and who was alleging by his counsel in plain terms that he had married her simply to get her money. The suggestion was proved to be a baseless one by the evidence of Dr. Herbert Meggitt, who had made an examination of the lady. Other like suggestions are, I am satisfied, equally untrue. The evidence of Mrs. Bomze's relatives convinced me that Dr. Bomze, who by September 25 had obtained and spent 3850*l.* out of the 4000*l.* provided by his wife's brother, in effect made it impossible for her to remain in the house after September 27, and that her relatives were forced after an attempted reconciliation to take her away. The evidence on the point was somewhat voluminous and perhaps irrelevant except as bearing on the credit of Dr. Bomze; but I will observe that it is established, in my opinion, that, when Mrs. Sherman and her two brothers went to the house at five o'clock as the result of urgent telephone messages, Dr. Bomze remarked that if they had come five minutes later they would have found their sister in the street.

The legal result of the facts, which I have found after a careful consideration of the evidence, must now be considered; and it is necessary to be on one's guard against the prejudice which the defendant's conduct and present attitude might well inspire. As I have already said, the agreement of May 6 must stand. Counsel for Dr. Bomze strenuously argued that the agreement proved that there was a gift of 4000*l.* to Dr. Bomze if he married Miss Lederman. In my view, the agreement as well as the evidence clearly proves the contrary. After the marriage neither of the spouses could use the money without the consent of the other. It was also contended, as I have said, that the true bargain was that Dr. Bomze was to be given the money without conditions, but I find that this assertion is untrue.

There remain the questions as to the withdrawals from the deposit account. The first withdrawal of 1000*l.* on May 15 was admittedly for the purpose of buying the practice from Dr. Berman; and it was so used. It is impossible for any part of this sum to be claimed successfully in this action. There remain the three remaining withdrawals: 2350*l.* on June 5, 150*l.* on August 2, and 350*l.* on September 25.

There is, in my opinion, a very great difference between gifts or dispositions from a wife to a husband and gifts or dispositions made by a young woman engaged to be married

MAUGHAM J.
1930
LLOYDS BANK, LD., *In re.*
BOMZE AND LEDERMAN *v.* BOMZE.

to an intended husband. In the former case it is well settled that the relation is not one of those to which the doctrine of *Huguenin* v. *Baseley* (1) applies, and that the burden of proving undue influence lies upon those who allege it: *Nedby* v. *Nedby* (2); *Howes* v. *Bishop* (3); *Bank of Montreal* v. *Stuart.* (4) But where there is evidence that a husband has taken unfair advantage of his influence over his wife or her confidence in him, it is not difficult for the wife to establish her title to relief: *Willis* v. *Barron* (5), where the decision of the trial judge was reversed; *Turnbull* v. *Duval* (6); *Bank of Montreal* v. *Stuart.* (4) A wife in such a transaction is obviously not in the same position as a stranger; and, though I think the passage cited from Halsbury, vol. xvi., para. 789, is not quite accurate, it cannot be doubted that the necessity of showing that a transaction of the nature of a large gift or conveyance to a husband was a fair and proper one, in a case where the wife has not been separately advised, may, without much difficulty, be thrown upon the husband, or those who claim through him. If a wife living with her husband authorizes her income to be paid to her husband, the above remarks have no application; and it is clear that she, in the absence of special circumstances, cannot recall such a gift: *Caton* v. *Rideout.* (7)

A young woman engaged to be married is in a very different position. In most cases she does not interest herself in her future pecuniary position as between herself and her husband. In general, she reposes the greatest confidence in her future husband; otherwise she would not marry him. In many, if not most, cases she would sign almost anything he put before her. In my judgment, the doctrine of *Huguenin* v. *Baseley* (1) applies to such a relationship; and the reasons given in *Howes* v. *Bishop* (3) for not extending the equitable principle to the case of husband and wife have no application. There is also authority in favour of my view: *Cobbett* v.

(1) 14 Ves. 273.
(2) (1852) 5 De G. & Sm. 377.
(3) [1909] 2 K. B. 390.
(4) [1911] A. C. 120, 137.
(5) [1902] A. C. 271.
(6) [1902] A. C. 429.
(7) 1 Mac. & G. 599.

Brock (1); *Lovesy* v. *Smith* (2); and those cases, I think, ought to be followed. (See also the observations of Lord Langdale in *Page* v. *Horne.* (3))

I return with these observations to the withdrawal of the sum of 2350*l.* before the marriage. Dr. Bomze has wholly failed, in my view, to establish that, if this was a gift, it was a proper one, except perhaps as to 350*l.* required for expenses of a marriage and a honeymoon. If Miss Lederman had been advised by an independent adviser, I have no doubt that he would have insisted on the charge for 2000*l.* being transferred to her or kept alive for her benefit. The transaction was, I think, as between those two parties "immoderate and irrational," if I may borrow the language used by Lord Macnaghten in delivering the judgment of the Privy Council in *Bank of Montreal* v. *Stuart.* (4) Apart from the question of onus, I find that unfair advantage was taken of Miss Lederman and that she is entitled to relief at least as regards 2000*l.* I accept the view that Mr. Alfred Lederman was told that it was desired to withdraw 350*l.* for the expenses of the marriage and consented to that being done; but, as I have already said, I am satisfied that he was told nothing about the additional 2000*l.*, which may have been an afterthought on the part of Dr. Bomze. Next, with regard to the 150*l.* withdrawn on August 2, 1929, I think on the whole that Mrs. Bomze cannot recall this sum which was used, I gather, for the joint expenses of the husband and wife. Such a transaction is within the principle of *Caton* v. *Rideout.* (5) With regard to the sum of 350*l.* withdrawn on September 25, 1929, the case is more doubtful. I am inclined to the view that the motor car bought with this money is the property of the wife; but I cannot so decide in this action. I cannot, therefore, give Mrs. Bomze relief in regard to this sum.

In my judgment the result is that the plaintiffs have established their right to succeed as regards the sum of 2000*l.*,

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(1) 20 Beav. 524.

(2) 15 Ch. D. 655.

(3) 11 Beav. 227, 235.

(4) [1911] A. C. 120, 137.

(5) 1 Mac. & G. 599.

MAUGHAM J.
1930
LLOYDS BANK, LD., *In re.* BOMZE AND LEDERMAN *v.* BOMZE.

part of the 2350*l.* withdrawn on June 5. This sum ought strictly to be paid to the current account of Dr. Bomze and Mrs. Bomze at Lloyds Bank pursuant to the terms of the agreement of May 6, 1929. It would seem that they have equal rights in respect of that sum and also in respect of the sum of 150*l.* which remains standing on deposit account in their names. But if there is no chance of the parties coming together again, the sensible course will be to consent to divide these moneys, and in that case there will be judgment for the plaintiffs for 1000*l.*, half the sum of 2000*l.*

As regards costs, the defendant must pay the plaintiffs' costs except so far as they have been increased by the claim to set aside or rectify the agreement of May 6, 1929. As regards those costs there will be the usual set-off.

Solicitors: *Denton, Hall & Burgin; Lawrence M. Davis.*

K. R. A. H.

In re CUGNY'S WILL TRUSTS.

SMITH *v.* FREEMAN.

MAUGHAM J.

1930

May 23.

[1929. C. 4468.]

Law of Property—Will—Settlement—Settled Land—Undivided Shares—Vesting Assent—Statutory Trusts—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 36, *sub-ss.* 1, 4; *Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *First Schedule, Part IV., para.* 2.

Under a settlement contained in a will the settled property was directed to be held, after the death of the first tenant for life, in trust, as to both corpus and income, for the children and issue of the first tenant for life in equal shares as therein mentioned. The first tenant for life died in 1929, having by her will appointed to be her executors and trustees two persons who, at the date of her death, were trustees of the settlement and of the will containing it. On a summons by the executors and trustees as plaintiffs for the determination (inter alia) of the question whether, for the purpose of vesting in themselves the land the subject of the settlement contained in the will, they should, as executors of the first tenant for life, execute in favour of themselves, as trustees of the will containing the settlement, a vesting assent upon the statutory trusts for sale of the land the subject of the settlement, or should apply for a grant to themselves of probate of the will of the first tenant for life limited to that land:—

Held, that s. 36 of the Settled Land Act, 1925, applied, and that the plaintiffs, as executors of the first tenant for life ought, pursuant to that section, to execute a vesting assent in favour of themselves as trustees of the will containing the settlement.

SUMMONS.

By her will dated December 8, 1900, Isabella Cugny (hereinafter called "the testatrix"), after directing payment of her debts and funeral and testamentary expenses, a legacy of 200*l.*, and an annuity of 26*l.* to a brother who died before the date of this summons gave and devised her residuary estate to her executors and trustees therein named ". . . . subject thereto upon trust to retain the whole of my said real and personal estate in specie whether the investments thereof shall or shall not be trustees' investments, and to stand possessed thereof and of the investments for the time being representing the same (hereinafter called 'my residuary

MAUGHAM J.

1930

CUGNY'S WILL TRUSTS, *In re.*

SMITH *v.* FREEMAN.

estate ') in trust to pay the net income arising therefrom whatsoever the state of investment may be unto my daughter Ethel Mews, the wife of John Mews of 68 Queensborough Terrace Kensington Gardens in the County of Middlesex Esquire during her life for her separate use without power of anticipation, and after her death to hold both the corpus and income of my residuary estate in trust for all or any her children or child who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry and if more than one in equal shares. I declare that the share in my residuary estate hereinbefore given to any daughter of the said Ethel Mews shall not vest absolutely in such daughter but shall so far as the law allows be retained by my trustees in trust during the life of such daughter to pay the income of her said share to her for her separate use without power of anticipation, and after the death of such daughter in trust for all such one or more exclusively of the others or other of the children or remoter issue of such daughter, such remoter issue being born and taking vested interests within twenty-one years after the death of such daughter at such respective ages or times and if more than one in such shares and with such trusts for their benefit and such provisions for their respective advancement either in the lifetime or after the death of such daughter and for maintenance and education at the discretion of my trustees or any other person or persons and in such manner in all respects as such daughter shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil appoint and in default of and subject to any such appointment in trust for all or any the children or child of such daughter who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry and if more than one in equal shares." The testatrix by the will appointed to be executors and trustees thereof her daughter the said Ethel Mews, her daughter's husband the said John Mews, and William Tingey, and appointed them also to be trustees of the will for the purposes of the Settled Land Acts: and by the will she also declared that the power of appointing new trustees thereof should be vested in Ethel Mews during her life and after her death in John Mews during his life. The testatrix died a widow on October 5, 1905, leaving no children other than Ethel Mews, and her will was proved by Ethel Mews and John Mews, William Tingey having renounced probate. Ethel Mews and John Mews had two children, who attained the age of twenty-one, John Keith Mews, who died unmarried in 1918, and a daughter Gladys, married on June 5, 1915, to Wilfrid Freeman. Gladys and Wilfrid Freeman had two children both living at the date of this summons—namely, Bridget Anne Elizabeth, born on March 6, 1920, and John Keith Noel, born on July 28, 1923.

John Mews died on December 10, 1926, and by a deed dated March 22, 1927, Ethel Mews appointed Eric Pendrell Smith to be trustee of the testatrix's will in his place. There were two schedules to the deed, in the second of which were set out the freehold ground rents hereditaments and premises the property of the testatrix at the time of her death. By another deed dated March 22, 1927, Ethel Mews appointed Eric Pendrell Smith to be a trustee of the testatrix's will in the place of John Mews for the purposes of the Settled Land Act, 1925: and by a vesting deed dated April 28, 1927, and made between Ethel Mews and Eric Pendrell Smith of the one part and Eric Pendrell Smith of the other part it was declared that all and singular the freehold premises and hereditaments mentioned in the schedule thereto (being certain of the freeholds in the second schedule to the first above mentioned deed of March 22, 1927) and all other (if any) the premises capable of being vested by that declaration which were by any means subject to the limitations of the testatrix's will were vested in Ethel Mews in fee simple, that Ethel Mews should stand possessed of the same upon the trusts and subject to the powers and provisions upon and subject to which the same ought to be held from time to time under that will, that Ethel Mews and Eric Pendrell Smith were the trustees of the testatrix's will for the purposes of the Settled Land Act, 1925, and that the power to appoint a new trustee or new trustees of the testatrix's will was vested in Ethel Mews during her life.

By an order of the Master in Lunacy dated December 16, 1927, Mrs. Enid King, a step-daughter of Ethel Mews, was appointed receiver of Ethel Mews' affairs: and by a further order of the Master in Lunacy dated June 15, 1928, Peter MacIntyre Evans was appointed trustee of the testatrix's will in place of Ethel Mews to act jointly with Eric Pendrell Smith.

Ethel Mews died on October 10, 1929, having by her will appointed Eric Pendrell Smith, Peter MacIntyre Evans, and Enid King to be her executors and trustees. Probate was granted on December 5, 1929, to Eric Pendrell Smith and Peter MacIntyre Evans (hereinafter called "the plaintiffs"), power being reserved to Enid King, who was out of England at the time: and this summons, taken out on December 16, 1929, by the plaintiffs, asked (inter alia) whether, for the purpose of vesting in them the land the subject of the settlement (created by the testatrix's will) (*a*) the plaintiffs should, as the executors of Ethel Mews deceased, execute in favour of themselves, as the trustees of the testatrix's will, a vesting assent upon the statutory trusts for sale of the said land; or (*b*) should apply for a grant to themselves of probate of the will of Ethel Mews limited to that land.

Topham K.C. and *J. A. W. Gibson* for the summons. Land which, up to January 1, 1926, was settled land, is converted by s. 36 of the Settled Land Act, 1925, into land subject to a trust for sale (1): *In re Bridgett and Hayes' Contract.* (2) If para. 2 of Part IV. of the First Schedule to the Law of Property Act, 1925, applies, it will be necessary to ascertain what would have happened had the situation arisen before 1926. (1) To construe s. 36 of the Settled Land Act, 1925, as referring to the land in the present case will be to give to it a construction slightly different from that given by Romer J. to the sections of the Administration of Estates Act, 1925, in *In re Bridgett and Hayes' Contract.* (2) Up to the date of Ethel Mews' death the land was settled land, and there is no reason why it should not continue to be so.

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(1) Sect. 36, sub-s. 1: "If and when, after the commencement of this Act, settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares, the trustees of the settlement, (if the settled land is not already vested in them) may require the estate owner in whom the settled land is vested (but in the case of a personal representative subject to his rights and powers for purposes of administration), at the cost of the trust estate, to convey the land to them, or assent to the land vesting in them as joint tenants, and in the meantime the land shall be held on the same trusts as would have been applicable thereto if it had been so conveyed to or vested in the trustees."

Sub-s. 4: "An undivided share in land shall not be capable of being created except under a trust instrument or under the Law of Property Act, 1925, and shall then only take effect behind a trust for sale."

(2) [1928] Ch. 163.

Rawlence for the defendant Gladys Freeman.

Evershed for the defendants Bridget Anne Elizabeth Freeman and John Keith Noel Freeman.

Sir Arthur Underhill for the National Provincial Bank, Ld., as executor of John Mews.

MAUGHAM J. I will decide that s. 36 of the Settled Land Act, 1925, applies, and will accordingly declare that the plaintiffs, as executors of Ethel Mews, ought, pursuant to that section, to execute a vesting assent in favour of themselves as trustees of the testatrix's will. In so deciding I accept the view of para. 2 of Part IV. of the First Schedule to the Law of Property Act, 1925, expressed in the note to the paragraph in Wolstenholme and Cherry's Conveyancing Statutes, 11th ed., vol. i., p. 510.

Solicitors: *Sidney Smith, Son & Leefe; Thomas Eggar & Son; Trinder, Kekewich & Co.*

(1) First Schedule, Part IV., para. 2: "Where undivided shares in land, created before the commencement of this Act, fall into possession after such commencement, and the land is not settled land when the shares fall into possession, the personal representatives (subject to their rights and powers for purposes of administration) or other estate owners in whom the entirety of the land is vested shall, by an assent or a conveyance, give effect to the foregoing provisions of this Part of this Schedule in like manner as if the shares had fallen into possession immediately before the commencement of this Act, and in the meantime the land shall be held on the statutory trusts."

(2) [1928] Ch. 163.

K. R. A. H.

C. A.
1930
Nov. 10, 11, 12, 13; Dec. 9.

SAGAR *v.* H. RIDEHALGH AND SON, LIMITED.

[1928. S. 3359.]

Master and Servant—Weaving Trade—Wages—Deduction for bad work—Term of Contract—Practice of Mill—Lancashire usage—Legality—Truck Act, 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3.

The plaintiff was a weaver in the defendants' employment and his wages were calculated on the amount and kind of cloth woven in each week in accordance with a uniform list of prices agreed between the employers' and workmen's unions. According to the list of prices, the plaintiff became entitled for the week ending August 1, 1928, after agreed deductions to a sum of 2*l.* 5*s.* 0½*d.*, but the defendants only paid him 2*l.* 4*s.* 0½*d.*, claiming the right to deduct 1*s.* in respect of three yards of cloth woven with a fault rendering them unmerchantable. The evidence showed that it had been the practice of the mill for many years to make deductions for work not done with reasonable care and skill, the deductions not exceeding in amount the loss sustained by the employers and often not being exacted. A similar usage existed in the bulk of the mills carrying on the Lancashire weaving trade, though some of the mill owners were trying to do without deductions:—

Held (1.), that the established practice in the defendants' mill resulted in the incorporation in the contract of employment of the plaintiff as of all other weavers employed at the mill of a term enabling the employers to make a deduction (not exceeding the actual or estimated loss occasioned) from the specific sum payable for each piece of cloth woven, if the workman did not exercise reasonable care and skill in weaving the cloth.

(2.) That this practice was not rendered illegal by the Truck Act, 1831, s. 3, as it did not involve a deduction for bad work from ascertained wages but a deduction for bad work made in calculating the wages.

Chawner v. *Cummings* (1846) 8 Q. B. 311 and *Hart* v. *Riversdale Mill Co.* [1928] 1 K. B. 176 followed on this point.

Per Lord Hanworth M.R. Authorities which include *Farnsworth* v. *Garrard* (1807) 1 Camp. 38, *Mondel* v. *Steel* (1841) 8 M. & W. 858 and *Sharp* v. *Hainsworth* (1862) 3 B. & S. 139 establish that in a contract of employment between master and servant involving the use of reasonable care and skill by the servant, the master has a right to make a deduction from wages for bad work, unless it is contrary to the express terms of the contract or in breach of any statute.

Per Lawrence L.J. A usage in the Lancashire weaving mills allowing an employer to make at his discretion deductions from wages for bad work, not exceeding a certain defined limit, is neither unreasonable nor uncertain; and the fact that it at present exists at about 85 per cent. only of the mills does not prevent it from being a good legal usage on the ground of want of universality: *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905) 92 L. T. 328, 332 applied.

Decision of Farwell J. [1930] 2 Ch. 117 reversed.

APPEAL from a decision of Farwell J. (1)

The plaintiff was a cotton weaver in the employment of the defendants who carried on business as cotton manufacturers in Nelson, Lancashire. The plaintiff had come into the defendants' employment in the following way. In 1920 the plaintiff's father, who was in the defendants' employment as a weaver, obtained leave from the defendants' manager to bring the plaintiff with him to the mills to learn a weaver's work. After about a year, during which the plaintiff received no wages, his father went to the manager and asked him to take on his son as a weaver; and one day soon afterwards, when the plaintiff went to the mill with his father, the manager pointed out to him two looms that were not working and said he would give him a trial. Since then the plaintiff had worked as a weaver for the defendants without any further arrangement or agreement, receiving wages calculated on the amount of cloth woven on the basis of the "Uniform List of Prices," a standard of prices agreed between the Amalgamated Weavers' Association and the Cotton Spinners' and Manufacturers' Association. The plaintiff was a member of the Nelson and District Weavers' Association, a component part of the Amalgamated Weavers' Association, and the defendants were members of the Nelson Cloth Manufacturers' Association, a component part of the Cotton Spinners' and Manufacturers' Association. In compliance with s. 116 of the Factory and Workshop Act, 1901, the defendants posted up in the factory a notice stating that the weavers' wages at the mill were paid on the basis and conditions of the Uniform List of Prices; and when any work was given out to a weaver a card known as a tally card showing the particulars of the cloth to be woven and the price payable for it was given out.

In the book containing the uniform list of prices were included joint rules for the settlement of trade disputes in the weaving, winding and warping departments, agreed between the Cotton Spinners' and Manufacturers' Association and the Amalgamated Weavers' Association. Rule 1 made provisions as to the course to be taken in the case of a trade

(1) [1930] 2 Ch. 117.

dispute arising between a member of an association comprised in the Cotton Spinners' and Manufacturers' Association and any operative member or members of an association comprised in the Amalgamated Weavers' Association. Rule 2 provided for a joint inspection by representatives of employers and of operatives of material of a mill in the event of a complaint of bad material and that, failing a satisfactory settlement at such joint inspection, the complaint should be regarded as a trade dispute to which r. 1 with certain modifications should apply. Rule 4 provided that in case of underpayment of the uniform list of prices for weaving and when such underpayment was admitted or when the accused employer refused his consent to a joint inspection of work the operatives were to be at liberty to bring the matter before either the local or general employers' association.

The number of looms entrusted to the plaintiff were gradually increased and in July, 1928, he was in charge of four looms. He was paid at the rates prescribed in the uniform list until July 25, 1928. For the week ending August 1, 1928, he was entitled according to the list to a wage of 2*l.* 6*s.* 6½*d.*, which included a sum of 7*s.* 4*d.* for an 80 yards piece of sateen woven by him. From the wage was deducted 1*s.* 4*d.* for insurance and an agreed sum of 2*d.* for hospitals, leaving a total of 2*l.* 5*s.* 0½*d.* The defendants, however, only paid him 2*l.* 4*s.* 0½*d.*, claiming to deduct 1*s.* in respect of a fault in 3 yards of the 80 yards piece which resulted from the plaintiff's failure to piece up a broken thread of the warp. This had made it necessary to cut out the 3 yards of cloth as being unmerchantable, and the defendants alleged that this was due to the plaintiff's carelessness.

The plaintiff brought this action claiming a declaration that for the week ending August 1, 1928, he was entitled to the sum of 2*l.* 5*s.* 0½*d.* for wages; a declaration that the defendants' deduction of 1*s.* from these wages was illegal, as being contrary to the provisions of s. 3 of the Truck Act, 1831; and payment by the defendants of the sum of 1*s.*

Evidence was given at the hearing that the practice at the defendants' mill of making deductions for careless work

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.

had been in existence for many years, that deductions in no cases exceeded the amount of the loss occasioned to the employers by the careless work, and that the deductions were often not insisted upon but were made when the carelessness was persisted in after warnings. The plaintiff, however, stated that at the time of his engagement he knew nothing of the system of fines or deductions, and that until much later he did not become aware that there was such a system in vogue in the defendants' mill. He admitted that he had previously been reprimanded for carelessness. He also admitted in cross-examination that he only expected to be paid in accordance with the standard list for weaving that was skilfully and carefully done.

Evidence was also given by the defendants with the object of proving a general usage of the Lancashire weaving trade identical with the practice at the defendants' mill. There was, however, a number of mills in the area where deductions by way of fine were not made. The further evidence in regard to this sufficiently appears in the judgment.

Farwell J., after finding that the three yards of cloth had been rendered unmerchantable by the plaintiff's carelessness and that the resulting loss exceeded the sum of 1*s.*, decided, first, that, apart from any usage, a weaver was, so long as he remained in the employment of his employer, entitled to be paid for his work at the rate fixed by the uniform list of prices, whether the cloth woven by him was merchantable cloth or not, but subject to the employer's right to terminate the contract of employment if the weaver failed to exercise reasonable care or skill; secondly, that such cases as *Farnsworth* v. *Garrard* (1) and *Mondel* v. *Steel* (2) had no application to a case where the relation of master and servant existed and did not therefore entitle the master to deduct from the sum payable to the servant the loss sustained by reason of the servant's failure to exercise reasonable skill and care, and that in any case any such deduction would be illegal under the Truck Act, 1831; thirdly, that there was no evidence that when the plaintiff

(1) 1 Camp. 38. (2) 8 M. & W. 858.

entered the defendants' employment there was any term in the contract between them, apart from usage, to justify a deduction from wages; fourthly, that there was no usage in the cotton trade in Lancashire permitting a deduction for bad work which the law could recognize. The practice was not universal, for it was not followed in about 15 per cent. of the mills, though in some of them it had only been suspended for a time to see whether it was possible to get rid of it, and in some mills a different practice was followed by which the weaver was compelled to take unmerchantable cloth woven by him, the price being deducted from his wages. Further the practice was not reasonable or certain, because it was precarious, depending on the will of the master. In addition the usage was illegal under the Truck Act, 1831, because on the true view the deduction was a deduction from wages and not a deduction made in calculating the amount of wages. He therefore granted a declaration that in respect of the wages payable to the plaintiff by the defendants under the contract of employment as a cotton weaver for the week ending August 1, 1928, he was entitled to the sum of 2*l.* 5*s.* 0½*d.*, and he made an order for payment to the plaintiff of 1*s.*

The defendants appealed. The appeal was heard on Nov. 10, 11, 12, 13, 1930.

Cyril Atkinson K.C., *Derbyshire K.C.* and *Ormerod* for the appellants. The plaintiff claims to be paid in full for his weaving at piece work rate, although he had spoiled three yards out of a piece of eighty yards through his gross negligence. These three yards had to be cut out of the piece, and the appellants claim that they had the right to make a deduction for the bad work, as they did. They resist the plaintiff's claim to be paid the full rate without deduction on three grounds—namely: (1.) that the wages were paid for good work producing merchantable cloth. On the evidence, including the plaintiff's evidence, this is really uncontradicted; (2.) that it was a practice of the particular mill to make a deduction for bad work in calculating the wages, and this practice must be an implied term of the plaintiff's contract of employment, who must be taken to have been employed on the same terms as the other weavers in the mill; and (3.) that it was the custom of the whole trade to make a deduction for bad work not exceeding the reduction in the value of the work done caused by the defective work. Under the Factory and Workshop Act, 1901, s. 116, particulars of the rates of wages applicable to the work to be done had to be supplied to each weaver when the work was given out to him, and a placard had to be exhibited in each room showing the basis and conditions by which the prices were regulated. It will be said that no deduction could be made altering the rate of wages, but the answer is that either because the wages paid were only payable for merchantable cloth or because of the usage in the trade or the practice in the particular mill, a deduction for bad work could be made in calculating the amount of the wages. The method of calculating wages is contained in a book called "Uniform List of Prices," and it is said that no provision is made there for deduction for bad work. But in fact the Joint Rules for the Settlement of Trade Disputes contained in the book include rules providing for fixing the compensation payable to the workman when there are an excessive number of breaks owing to an inferior quality of yarn being given out (rule 2) and for dealing with any alleged underpayment to the workman (rule 4). Rule 4 would apply to such a case as this, and the rules are part of the contract of employment.

In an action brought by a contractor to recover the contract price the defendant can set up by way of defence that the value of the work had been diminished by the plaintiff's negligence: *Basten* v. *Butter*. (1) The defendant can show that the value of the work done is less than that contracted for. It is said that this does not apply as between master and servant, but the rule is laid down as one of general application in *Mondel* v. *Steel*. (2) See also *Farnsworth* v. *Garrard*. (3) It was approved in *Bow, McLachlan & Co.* v.

(1) (1806) 7 East, 479, 484.
(2) 8 M. & W. 858.
(3) 1 Camp. 38.

Ship "Camosun" (1) and *Thornton* v. *Place* (2), and was applied to a case of master and servant in *Sharp* v. *Hainsworth.* (3) It was held in this case, upon a complaint made under 20 Geo. 2, c. 10, s. 1, by an artificer against his master for non-payment of wages, that the justices might make a deduction from the wages on the ground that the work was badly done. That case emphasizes the fact that in these cases it is a question of adjustment by making a deduction in ascertaining the wages payable and not one of set-off. Compare also *Dakin & Co., Ld.* v. *Lee.* (4)

The deduction is made in lieu of the master making a separate claim for damages from the employee, which he is entitled to do: *Hindley* v. *Haslam* (5); *Hughes* v. *Lenny.* (6)

[LAWRENCE L.J. *Keates* v. *Lewis Merthyr Consolidated Collieries, Ld.* (7), recognizes that the employer has a remedy against a negligent workman for damages.]

There is no ground for saying that a servant's position differs in any way from that of an ordinary contractor as regards the right to set up negligence as a defence: compare Addison on Contracts, 11th ed., p. 889; and Leake on Contracts, 7th ed., p. 42.

[LORD HANWORTH M.R. referred to *Davis* v. *Hedges.* (8)]

It is contended that the course adopted of making deductions for bad work that has been followed in the defendants' mill is in accordance with the practice laid down in the cases cited. If so, the question whether a custom exists enabling this to be done is of little importance, but it is submitted that there was clear evidence of such a custom.

Farwell J. has held the deduction of 1*s.* to be illegal as contravening the Truck Act, 1831 (1 & 2 Will. 4, c. 37). It is true that ss. 1, 3 and 5 of that Act prevent an employer when paying wages to a workman from making any deductions except those expressly authorized in the Act: *Williams* v.

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(1) [1909] A. C. 597, 610.
(2) (1832) 1 Moo. & R. 218.
(3) 3 B. & S. 139.
(4) [1916] 1 K. B. 566, 579, 581.
(5) (1878) 3 Q. B. D. 481.
(6) (1839) 5 M. & W. 183.
(7) [1910] 2 K. B. 445; [1911] A. C. 641.
(8) (1871) L. R. 6 Q. B. 687.

North's Navigation Collieries (1889), *Ld.* (1); but it does not prevent a deduction for bad work being made in the course of computing the wages. Here the deduction was something taken into account in calculating the amount of the wages actually due: *Hart* v. *Riversdale Mill Co.* (2) The practice or usage which exists is therefore in accordance with the law and cannot be held to be unreasonable. The Hosiery Manufacture (Wages) Act, 1874 (36 & 37 Vict. c. 48), s. 1, recognizes the practice of stoppage of wages for bad work, though s. 3 makes it illegal to make any deduction for "frame rent and standing or other charges." The view that the Truck Act, 1831, does not prevent a deduction for bad work made in computing wages is supported by *Chawner* v. *Cummings* (3) and *Archer* v. *James*. (4) In *Willis* v. *Thorp* (5), a case under the Hosiery Manufacture (Wages) Act, 1874, s. 3, which is stronger than the provision in the Truck Act, a deduction from wages for staying away from work without permission was held legal. These cases were referred to without disapproval in *Williams* v. *North's Navigation Collieries* (1889), *Ld.* (1), a case which really has no application here. Another case justifying the practice adopted in the present case is *Chapel* v. *Higgs*. (6)

The Truck Act, 1896, s. 2, recognized the practice of making deductions for bad work and made certain provisions in regard to it for the protection of the men, but those provisions do not apply to the Lancashire cotton trade, as the operation of the Act was expressly excluded in regard to that trade by an order made under s. 9 on the application of the men employed in the trade.

It is wrong to say in this case that the master is placed in the position of a judge in his own case. The practice is clear. He can only deduct for bad work and he can only deduct an amount not exceeding the loss suffered by him owing to the bad work.

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(1) [1906] A. C. 136.
(2) [1928] 1 K. B. 176.
(3) 8 Q. B. 311.
(4) (1859) 2 B. & S. 61; (1862) 31 L. J. (Q. B.) 153.
(5) (1875) L. R. 10 Q. B. 383.
(6) (1833) 3 L. J. (Ex.) 38.

C. A.
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SAGAR
v.
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Schiller K.C., *Laski K.C.* and *G. Corderoy* for the respondent. If on the true view the deduction of 1*s.* was made after the wages had been computed, it was illegal under the Truck Act, 1831, s. 3: *Williams* v. *North's Navigation Collieries.* (1) It is true that in that case the deduction claimed was for something outside the period during which the wages in question had been earned; but the decision was perfectly general, and decided that no deduction could be made by an employer from the ascertained wages. Here the appellants' own evidence shows conclusively that the deduction was not made in computing the wages. The employer was obliged by the Factory and Workshop Act, 1901, s. 116, to give notice to the workman at the time his work was given out of the rate of wages to be paid. When this was done, nothing was said of a deduction being made for bad work. Thus in this particular instance the workman was informed that he would be paid 7*s.* 4*d.* for weaving an 80 yards piece. Any deduction made from that was clearly a deduction from wages and not a deduction made in computing wages, for the employer must be taken to have complied with his statutory obligation, and nothing was said of the possibility of the wage earned being less than that specified for each piece of work as it was given out. Rule 4 of the Joint Rules for the Settlement of Trade Disputes does not apply to such a case, but only to a case where payment was made for the wrong kind of cloth. The evidence is clear that the deduction made was a fine inflicted for defective work as a disciplinary measure. *Hart* v. *Riversdale Mill Co.* (2), which relates to the same practice, does not apply here. In that case the matter came before the Court on a Case stated, and the Case found as a fact that it was part of the contract of employment that the wages should be calculated having regard to the character and quality of the work done. (3) That was a finding of fact which bound the Court. Here the evidence shows that the deduction was made from the wages and imposed to make the workman do better work for the future. If so it is contrary to the Truck Act, 1831, s. 3. In the Truck Act, 1896, which permitted the practice subject to certain protective provisions, the cotton trade of Lancashire was excepted.

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(1) [1906] A. C. 136.

(2) [1928] 1 K. B. 176.

(3) [1928] 1 K. B. 186.

The appellants seek to escape from this difficulty by saying that the contract was to weave merchantable cloth. But on the true view the contract was to weave generally with, no doubt, an implied term that ordinary care and skill should be used in weaving. A breach of this implied term would only give rise to a claim for damages. Moreover, even if a deduction could be made, it could only be for the part of the pay attributable to the worthless work. Here that would have been a sum of about 3*d.*, so that the deduction of 1*s.* can in no way be justified. The sum of 1*s.* was an arbitrary figure fixed by the employer as a fine. In fact the contract of employment was to give services, and the production of cloth is only part of the services rendered, which include obedience and loyalty.

Reliance is, however, placed by the appellants on *Mondel* v. *Steel* (1), when for the first time on an action by a contractor for the contract price the Court, instead of leaving the employer to his claim for damages for defective work, allowed a deduction from the contract price to the extent of the account of the damages suffered through the plaintiff's default.

[LORD HANWORTH M.R. The possibility of giving judgment for the net amount which ought to be recovered had been previously recognized in *Farnsworth* v. *Garrard*. (2)]

That was on a quantum meruit. In no case has the principle of *Mondel* v. *Steel* (1) been applied as between master and servant, except in *Sharp* v. *Hainsworth*. (3) This is probably due to the Truck Act, 1831. In cases like *Mondel* v. *Steel* (1) the plaintiff is always suing for the contract price for work done, and the fact that the work is defective is set up as being a breach of warranty in diminution or even extinction of the claim: see Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 265. The action is always for a contract

(1) 8 M. & W. 858.

(2) 1 Camp. 38.

(3) 3 B. & S. 139.

price and not on a quantum meruit. The Court under that rule of procedure reduces the contract price by the amount of the damages suffered through the plaintiff's default. But *Williams* v. *North's Navigation Collieries* (1) is an authority for saying that even if the Court may in the same way make, as between master and servant, a deduction for bad work from wages being sued for, the employer himself cannot do so by reason of the Truck Act, 1831, s. 3. It might be said that the whole matter is now before the Court which could deal with it; but the issue in this action is whether the infliction of fines or abatements by the master is legitimate.

[*Cyril Atkinson K.C.* The appellants desire to have it decided whether the master has a legal right to make deductions for bad work apart from the Court.]

The remaining contention of the appellants is that the workman's contract of service must be taken to include a term that the employers should be entitled to make deductions for bad work, because of either (1.) a general custom affecting the Lancashire cotton trade, or (2.) the practice of the particular mill. The alleged general usage does not fulfil the three essential requirements of being "reasonable certain and notorious." The evidence showed that in some mills no deductions were ever made, and that in others the weaver was made to purchase damaged cloth at a price. Further in the particular mill, the practice was not certain. The fines were only sometimes made. It was left to the employers to say in each case whether they would exact a fine and, if so, what amount it should be. The alleged usage and practice are therefore perfectly vague and uncertain. Further, a usage or practice which contravenes the Truck Act, 1831, s. 3, cannot be said to be reasonable.

[They also referred to *Le Loir* v. *Bristow* (2) and *Moneypenny* v. *Hartland.* (3)]

Cyril Atkinson K.C. in reply. In *Hart* v. *Riversdale Mill Co.* (4) Scrutton L.J. pointed out the difficulty of construing the Truck Act, 1896, s. 2, as for the first time legalizing

(1) [1906] A. C. 136.
(2) (1815) 4 Camp. 134.
(3) (1826) 2 Car. & P. 378.
(4) [1928] 1 K. B. 176, 189.

deductions for bad work, having regard to s. 8, which provides that nothing in the Act should make lawful any contract or payment which was illegal under the Truck Act, 1831. If the contract referred to in s. 2—namely, a contract for a deduction for bad work, were illegal, that section could therefore have no effect. It is not open to the respondent to say that the Joint Rules are not part of his contract, for he pleaded that they were, and in evidence said that he had received payment for defective yarn under rule 2. He also admitted that the listed prices were for merchantable cloth. The rule in *Mondel* v. *Steel* (1) had nothing to do with set-off. The whole point of that case was that as the work had been defectively done, the claim for the contract price could not be enforced, and the defendant was allowed to prove by how much the value of the work done fell short of the price: compare *Basten* v. *Butter* (2) and *Thornton* v. *Place.* (3) *Sharp* v. *Hainsworth* (4) shows that the same principle applies as between master and servant: see also *Dakin & Co., Ld.* v. *Lee.* (5) Lastly, there is no reason for saying that the custom of the trade does not apply. Farwell J. found that it was notorious and well known. The mere fact that some firms contract out of the usage does not destroy it: *Ropner & Co.* v. *Stoate, Hosegood & Co.* (6) The usage being an implied term of the contract, it is clear that the deduction is made in computing the wages and does not offend against the Truck Act, 1831. As to what is a reasonable usage see *Grissell* v. *Bristowe.* (7) A usage of proved convenience to all parties in a trade will never be held unreasonable.

Cur. adv. vult.

Dec. 9. Their Lordships read the following judgments:—

LORD HANWORTH M.R. This action is brought by the plaintiff, a cotton weaver in the employ of the defendants, for a declaration that a sum of 1*s.*, which was deducted by

(1) 8 M. & W. 858.
(2) 7 East, 479.
(3) 1 Moo. & R. 218.
(4) 3 B. & S. 139.
(5) [1916] 1 K. B. 566, 579.
(6) 92 L. T. 328, 332.
(7) (1868) L. R. 4 C. P. 36, 47.

the defendants from the wages paid to him, on account of bad work done by him, in the course of carrying out his duty to his employers as a weaver, is due to him, and that this deduction is illegal and contrary to the terms of s. 3 of the Truck Act, 1831. The plaintiff's wages were estimated by piece-work. The defendants justify the deduction on the grounds that: (*a*) under the contract of employment the price of the piece-work, that is the wages to be paid to the plaintiff, was for good weaving only; (*b*) the practice at the defendants' mill, to which the plaintiff assented, expressly or impliedly, was to pay for good work producing merchantable cloth only; and that this practice, as the plaintiff well knew, included a right to make a deduction from the sum payable to the weaver if this standard was not adhered to by the workman; (*c*) the custom of the whole weaving trade in Lancashire recognized this practice as above stated, and justified a deduction if merchantable cloth was not produced by the workman; (*d*) the sum deducted was less than the amount of the deduction which might have been made by the defendants, if they had exacted the full sum by which the cloth woven by the plaintiff fell short of the standard required of him as above.

The plaintiff came to the defendants' mill in 1920 when he was thirteen years old, as a pupil to his father (who had been for some seven years a weaver in the defendants' employ, and held the position of a Shop Steward), in order that he should learn to be a weaver. After the plaintiff had been a pupil for twelve months, his father went to the manager, and asked that the son should be taken on as a weaver. The manager assented, and the plaintiff was put in charge of two looms, and began to receive wages on the basis of what is known as the "Uniform Price List," a standard for payment agreed upon between the unions of which the plaintiff and his employers were respectively members. The plaintiff was advanced after two years to look after three looms and subsequently four looms. He was paid at the rates prescribed in the List down to July 28, 1928. Before that date the plaintiff in his evidence said that he had been "brought to the warehouse on several occasions and chastised about his work " in respect of some pieces of cloth spoiled by him, though he had never suffered any deduction from his wages. On this date he was notified that a deduction would be made from his wages in respect of three yards of cloth spoiled. The proper deduction for this amount of cloth was 3*s.*; but when the wages were paid to the plaintiff for the week which ended on August 1, 1928, a deduction of 1*s.* only was made. The plaintiff resisted the defendants' claim to make this deduction, and on September 26, 1928, issued the writ in this action.

Farwell J., who tried the case, held that the deduction was not justified; that the practice above stated was not universal, nor reasonable or certain, and that the deduction was illegal under s. 3 of the Truck Act, 1831. From this judgment the defendants appeal.

The discussion in this Court covered a wide field, and a great number of authorities were referred to, some of which were not brought to the notice of Farwell J. Before turning to the evidence and forming a conclusion upon it as to the terms of the contract under which the plaintiff was engaged and did his work, it will be useful to deal with some of these authorities, and the statutes regulating the employment of and payment to workmen such as the plaintiff, in order to determine the nature of the contract, and to observe the rules and limitations within which such a contract of employment can be made. Long before the Truck Act of 1831 and other statutes relating to employment in factories had been passed, the terms of a contract of employment and the rights of an employer in respect of bad work had been considered in the Courts. In 1794 Buller J. had held in *Brown* v. *Davis* (1) that a defendant employer was not entitled to reduce the sum to be paid under a contract for work done, by a deduction in respect of bad workmanship, but that his remedy lay in a cross-action for damages. This case was reviewed in 1806 by the Court in banc in the case of *Basten* v. *Butter* (2), in which the Court (Lord Ellenborough C.J. and Grose, Lawrence

(1) Unreported. (2) 7 East, 479.

and Le Blanc JJ.) held that where a plaintiff sues upon a quantum meruit, he ought to be prepared to show that he had done the stipulated work according to his contract; and that it is open to the defendant to prove that the work was executed in such a manner as to be of no value at all to him or not to be of the value claimed. See per Le Blanc J. (1) In *Farnsworth* v. *Garrard* (2), an action upon a quantum meruit, Lord Ellenborough followed *Basten* v. *Butter*. (3) He said: "This action is founded upon a claim for meritorious service. The plaintiff is to recover what he deserves." He then referred to the decision of Buller J., and mentioned that he had had a conference with the judges upon the subject and stated what he considered to be the correct rule. "If there has been no beneficial service, there shall be no pay: but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. [That is if negligence be relied upon as an independent cause of action.] The claim shall be co-extensive with the benefit. Here then, has there been any benefit, and to what amount?" In *Thornton* v. *Place* (4) Parke J. gave the same ruling: "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction"; and in *Chapel* v. *Higgs* (5) the Court followed the same principle. Lord Lyndhurst said: "It cannot be consistent with reason, that a party who has not performed his contract should recover the full amount for which he has stipulated; and that the other party should be driven to an action against him for not performing the contract faithfully." Bayley B. stated the rule to be, that, if the contract be not faithfully performed, the plaintiff shall be entitled to recover no more than the value of the work and materials. Finally, in *Mondel* v. *Steel* (6) Parke B. said that the rule which had been found so convenient was established—namely, "that in all these cases of goods sold and delivered with a warranty,

(1) 7 East, 484.
(2) 1 Camp. 38.
(3) 7 East, 479.
(4) 1 Moo. & R. 218.
(5) 3 L. J. (Ex.) 38, 39.
(6) 8 M. & W. 858, 871.

and work and labour, as well as the case of goods agreed to be supplied according to a contract, ... it is competent for the defendant, in all of those, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by shewing how much less the subject-matter of the action was worth, by reason of the breach of contract." This right is one to be exercised at the defendant's option: see *Davis* v. *Hedges*. (1) In the case of *Sharp* v. *Hainsworth* (2) the above principle was applied to an information laid before justices under 20 Geo. 2, c. 19, s. 1, by an artificer to recover summarily, under that Act, wages due to him. That section gives jurisdiction to the justices, upon complaint made by servants, miners and a number of handicraftsmen, to make such order for payment of so much wages to such servant, artificer, etc., "as to such Justices shall seem just and reasonable" within a limit of 10*l*. The claim was for wages earned in weaving blankets, and the justices found that the blankets had been woven in improper lengths, and that the appellant, the employer, had been compelled to sell them at a serious loss. They decided, however, that they were bound to order payment of the full amount of wages without deduction. This decision was reversed on appeal, and the case remitted for the proper deduction to be estimated. Cockburn C.J. said the Court were of opinion that the justices could take into their consideration the question whether the work was so badly done that the master got no benefit from it, or that the value of the work was so deteriorated as that the whole amount of the wages was not earned. The case was not argued for the respondent, but nevertheless a decision of the Chief Justice, with Wightman, Blackburn and Mellor JJ. beside him, must be respected, and the facts present the same features as those of the case now under consideration.

The cases that I have referred to were once more considered and reviewed in recent years in relation to an action by a builder for the erection and repair of a house in respect of

(1) L. R. 6 Q. B. 687.

(2) 3 B. & S. 139.

which the owner complained of bad work. The principle above enunciated was held applicable both in the Divisional Court and by the Court of Appeal: see *Dakin & Co., Ld.* v. *Lee.* (1) It would seem, therefore, clear that in such a contract as that under which Sagar was employed, the defendants would have a right to make a deduction from his wages for bad work, unless there was some term of the contract which excluded this right, or unless such a deduction is forbidden by statute.

Farwell J. held that this principle is not applicable to the relation between master and servant. No authority is advanced for this proposition, and it seems contrary to the words of the judgments in the cases cited, particularly *Mondel* v. *Steel* (2) and *Sharp* v. *Hainsworth.* (3) The relation between master and servant is established by a contract between them, a contract which is subject to the rules applicable to other contracts, except in so far as statute law has superimposed limitations, or rights or duties inter se, upon such a contract and the parties to it.

I turn, therefore, to the consideration of these limitations. The Truck Act, 1831, was designed, as its title expresses, to prohibit the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm. By s. 3 it is provided that the entire amount of the wages earned by, or payable to, any artificer in any of the trades enumerated (which includes weaving) in respect of any labour by him done in any such trade shall be actually paid to such artificer in the current coin of the realm and not otherwise. It prohibits payment of any such wages by delivery to the artificer of goods, and no set-off is to be allowed against wages for goods supplied to him at any shop kept by or belonging to his employer, and it enforces these provisions by penalties. The device, therefore, of requiring the workman to purchase goods at an employer's shop, making deductions therefor from, or a set-off against, the wages of a workman—which was a practice at that time—is brought to an end. But s. 3

(1) [1916] 1 K. B. 566.
(2) 8 M. & W. 858.
(3) 3 B. & S. 139.

in terms deals with "the entire amount of the wages earned by or payable to" the artificer. It does not deal with any system by which those wages are to be estimated, but only with their payment after estimation. Further, s. 23 excepts from the generality of the prohibition a charge or deduction made at the true value for the supply of materials, tools or other specified services by the employer to the workman, when there is a contract in writing signed by the artificer. Thus in *Chawner* v. *Cummings* (1) it was decided that where a workman was paid a less sum than his wages because under the usages of the trade a frame rent, and sums for other services, were deducted in the mode of calculating the wages, the Act did not apply. The deductions were found to be not colourable, but all according to the usage of the trade, and made in the course of the calculation of the sum earned by the workman and so not a diminution of the wages earned by him. That case was considered in *Archer* v. *James* (2), and was followed by the Court in banc. In the Exchequer Chamber the Court were equally divided. But the principle on which *Chawner* v. *Cummings* (1) was decided—namely, that what had been done was a detail of the manner in which the wages were to be calculated, and before they were ascertained, does not appear to have been discountenanced. The judges who disagreed with *Chawner* v. *Cummings* (1) differed from their colleagues on what was paid for the artificer's labour, and held that any other ingredient contracted and paid for could not be considered as in the course of or part of the wages earned; but as outside the contract of labour; with the result that any deduction for such an ingredient was a deduction from the wages. This view of *Chawner* v. *Cummings* (1) is supported by the opening words of Blackburn J.'s judgment in *Willis* v. *Thorp* (3), and Bowen L.J. in his judgment in *Hewlett* v. *Allen & Sons* (4) recognizes the above cases as establishing that a mode of calculating the wages to be paid in which deductions are made may take the case outside the Truck Act altogether.

(1) 8 Q. B. 311.
(2) 31 L. J. (Q. B.) 153.
(3) L. R. 10 Q. B. 383.
(4) [1892] 2 Q. B. 662, 669.

By the Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 3, any deduction from wages for " frame rent and standing or other charges " was forbidden. In *Willis* v. *Thorp* (1) a deduction was made from the wages of the workman for fines for staying away from work without permission in accordance with the regulations of the factory. It was held that this was not within the prohibition of the section, and Blackburn J. in his judgment reviews the state of the law and notices the Truck Act as well as the particular Act subsequently passed. It is noticeable that the later Act in s. 1 expressly excepts from the prohibition of the Truck system a deduction or stoppage for bad and disputed workmanship, thus apparently recognizing that there was a right on the part of the employer to make such a deduction. Further, in the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which gave jurisdiction to the county courts, in cases of disputes between employers and workmen, a right of set-off is preserved to the employer in respect of the amount of damage which he may have sustained by reason of the absence of the workman or of his leaving his work: see s. 11. The case of *Williams* v. *North's Navigation Collieries* (2) was relied upon by the respondents in this appeal, but it does not, to my mind, deal with the case before us. The claim made by the employers in that case was to deduct from wages payable to the workmen on January 30, 1904, a sum which the workmen had been ordered to pay by the justices at Bridgend by an order made on January 16, 1904, for absenting themselves from their work previously to that date. I have ascertained these facts and dates from the original order which was produced from the Record Office. It would seem quite clear that the deduction was not made in the course of calculating the wages payable to the workmen on January 30, but that it arose out of a separate order made previously. Lord Davey points this out in his speech (3), and emphasizes the point that the facts before him took the case outside the principle of *Chawner* v. *Cummings.* (1) But he, and Lord Atkinson (2), recognized the principle and distinction arising where sums by way of deduction are to be taken into account in ascertaining the amount of wages actually earned.

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(1) L. R. 10 Q. B. 383.
(2) [1906] A. C. 136.
(3) [1906] A. C. 143.

The last case that I need refer to is *Hart* v. *Riversdale Mill Co.* (3) The facts were in substance similar to those in the case now before us. There was a difference of opinion in the Court below; the majority, Avory and Salter JJ., held that the deduction made from the wages of the weaver was not in contravention of s. 3 of the Truck Act. Lord Hewart C.J. held that the deduction was made from and after the wages had been ascertained and, therefore, not permissible under that section. The facts found by the justices included this, that by the terms of the contract "it was the duty of the workman to weave a good merchantable cloth by performing her work without negligence and in a careful manner," and that it was an implied condition of the payment to be made to her, according to the "standard list," "that the prices in the list should apply to good merchantable cloth produced by the observance by the workman of her duty as a weaver." Avory J., in his judgment, after dealing with the cases of *Chawner* v. *Cummings* (1); *Archer* v. *James* (4), and *Williams* v. *North's Navigation Collieries* (5), came to the conclusion, upon these facts, that neither in the statutes, nor in the reported decisions, was there anything making it illegal to calculate the wages earned as had been done in that case. Salter J. pointed out that the "standard list" provided for certain additions to be made to the wages in excess of the datum line of the "standard list"; and by parity of reasoning, where a deduction for bad work was to be made, both additions and deductions were to be made in the course of estimating the sum earned, and were not to be treated as additions to or deductions from the sum of the wages previously ascertained. In the Court of Appeal, Scrutton L.J. called attention to the findings of the justices to the effect that by the contract between the employer and the workman the wages depend on the quality of the work; and that if starting with standard wages you get work which is not standard work tendered to you, it is a matter of contract that the wages should be so much less than they would have been if the standard work had been performed properly. The Court held that the deduction that had been made was not a separate and independent deduction from the rightly ascertained wages, but was a loss which accrued to the workman in the true calculation of what sum she ought to have been paid as wages. That case cannot be distinguished from the present if there is a term in the contract of employment to the same effect as the justices found, applicable to the calculation of the wages to be paid.

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(1) 8 Q. B. 311.

(2) [1906] A. C. 146, 147.

(3) [1927] 1 K. B. 624; [1928] 1 K. B. 176.

(4) 31 L. J. (Q. B.) 153.

(5) [1906] A. C. 136.

Two matters must be noted. Sect. 2 of the Truck Act, 1896 (59 & 60 Vict. c. 44), provides that an employer shall not make a contract with a workman for any deduction, in respect of bad or negligent work, from the sum to be paid to the workman, unless certain conditions are complied with. But the observation falls to be made that the Legislature has not imposed an absolute prohibition on such deductions. By an Order made, however, under s. 9 of the Act, exemption from its provisions was granted to persons engaged in the weaving of cotton in Lancashire. Next it is admitted in the statement of claim that the provisions of s. 116 of the Factory and Workshops Act, 1901, which requires particulars of the rate of wages, applicable to the work to be done by each weaver, to be furnished to him in writing at the time when the work is given out to him, were complied with. There is no other statutory impediment to be considered, and the question, therefore, to be determined is whether in the present case there was a term in the contract which provided that the quality of the work done was to be taken into account in the estimation of the wages payable.

Mr. Schiller for the respondent went so far as to say that there was no promise of skill on the part of the workman; that under the contract of employment, the employer takes the risk of the workman's skill; that the workman only undertakes to exercise the skill that the employer has estimated that he possesses, and for which the employer agrees to pay him at the rates in the list of prices a fixed and certain remuneration for weaving: and thus, that any complaint of bad work must sound in a claim for damages outside the payment to be made for wages, and that such a claim was in the nature of a penalty.

Farwell J. found as a fact that the three yards of cloth in question was not merchantable cloth, that this was due to the plaintiff's carelessness, and that the loss suffered by the defendants owing to that fault exceeded the sum of the 1*s.* deducted. The plaintiff in his evidence admitted that his duty was to see that the cloth was being woven as perfectly as possible and that the weaving is carried out in a proper way. "A weaver does his work as well as he can do it. That is what he ought to do." He added: "It is up to the weaver to do his best, to bring care and skill to bear upon his work, and it is for that that he is paid." And again: "(Q.) To earn that money you have to bring your proper skill and care to the weaving of that cloth? (A.) Yes." Again: "Yes. I took it that these prices paid to me were prices paid for good work." There is abundant evidence to justify the finding of Farwell J. that the plaintiff was guilty of carelessness in his work, that he failed to comply with the standard of proper skill which he agreed it was his duty to exercise—indeed, he admitted his carelessness. Further, he agreed that the prices in the list and on the card issued to him were prices for work carefully done. It seems that there was on one occasion a strike or lock-out at a mill at Nelson arising out of a deduction made from wages. The plaintiff admitted he knew of it, that the strike came to an end, and that the system of deductions remained and was assented to. There was cogent evidence that the system of deductions in the estimation of the work to be paid for had been in operation at the defendants' mill for a long stretch of time and had been exercised from time to time at the discretion of the defendants, and their manager. Farwell J. found a difficulty in believing that the plaintiff did not become aware that there was such a system in vogue at the defendants' mill, and I share it. The Uniform List of Prices provides a scale of increased payment where special care has to be taken by the weaver, as in the case of what is known as "pickfinding," and provision is also made for an allowance in favour of the workman where inferior materials are provided for his weaving by the employer.

Our attention was called to Joint Rules for the Settlement of Trade Disputes adopted by the employers' and the weavers' associations. These Rules provide for the settlement of disputes as to a weaving price and cases of underpayment of the Uniform List of Prices for weaving. After careful consideration of these materials, it seems clear that the prices in the Uniform List provide a datum line above which the weaver may be entitled to be paid if he has been engaged on pickfinding or other special work, or has received improper materials to work upon. Equally, the workman on his part must suffer a deduction if he has not done the good work which the prices were intended to match. The plaintiff's evidence shows clearly that the basis of his employment was for good work, and in my judgment it was an integral term of it that he should not receive the full scale except for good work, not that bad work gave rise only to a right to dismiss the workman or sue him for damages. In other words, the contract between him and his employer was that in measuring the value of his work and the payment to be made to him, the quality of work not less than the quality of the materials supplied, and the nature of the work to be done, whether of an ordinary type or a superior class such as pickfinding, was to be taken into account. It matters not that these deductions were not always enforced. They may have been used for a disciplinary purpose, to enforce a standard of work by the weavers. They may have thus come to be known among the weavers as fines. If the contract provided that the work should be measured according to its quality, the principle laid down in *Basten* v. *Butter* (1) applies. Nor can *Mondel* v. *Steel* (2) be dismissed as a case dealing

(1) 7 East, 479.

(2) 8 M. & W. 858.

with procedure only. The procedure by way of defence was allowed, because the right to cut down the plaintiff's claim to its real value was established. Holding that the contract between the parties was of the terms that I have indicated, it is unnecessary to consider the practice at other mills or in any larger area. The contract was, in my judgment, one to which, following *Chawner* v. *Cummings* (1), the prohibition of the Truck Act does not apply.

The appeal must be allowed with costs, and judgment entered in the action for the defendants with costs.

LAWRENCE L.J. In this action the plaintiff, a weaver in the employ of the defendants, claims a declaration that the deduction by his employers from his wages of the sum of 1*s*. for a bad piece of weaving was illegal under s. 3 of the Truck Act, 1831. The writ also claims payment of the 1*s*. so deducted by the defendants, but in this Court counsel for the plaintiff confined the claim for relief to the declaration above mentioned, stating that the object of the action was to test the legality of a deduction for bad work made by the employers themselves, although the sum deducted might properly be made the subject of set-off or defence in an action brought by the workman for his wages.

In the case of *Williams* v. *North's Navigation Collieries (1889), Ld.* (2), the House of Lords decided that s. 3 of the Truck Act, 1831, does not allow an employer when paying wages rightly earned by or payable to a workman to deduct a sum due from the workman to the employer in respect of an antecedent breach of his contract to work. In the case of *Hart* v. *Riversdale Mill Co.* (3) the Court of Appeal decided that when a deduction made by the employer was not a deduction from wages rightly earned or payable, but a loss which accrued to the workman in the ascertainment of what sum for wages had been earned by or was payable to him, the deduction did not contravene the provisions of s. 3 of the Truck Act, 1831. The question we have to decide is

(1) 8 Q. B. 311.
(2) [1906] A. C. 136.
(3) [1928] 1 K. B. 176.

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.
Lawrence L.J.

whether the facts of the present case bring it within the decision in *Williams*' case (1) or within the decision in *Hart's* case. (2)

Three alternative views of the terms of the plaintiff's contract of service have been suggested in the course of the arguments before us—namely: (1.) that the employers agreed to pay the workman a specified lump sum for every piece of cloth whether well or ill woven, leaving the employers to their remedy for damages in case the workman should have committed a breach of his implied obligation to exercise reasonable skill and care; or (2.) that the employers agreed to pay the workman a specified lump sum for every piece of cloth woven if of good merchantable quality, leaving the workman, in case of bad workmanship, entitled to a quantum meruit only; or (3.) that the employers agreed to pay the workman a specified lump sum for every piece of cloth woven subject to a deduction (not exceeding the actual or estimated loss sustained by the employer) if the workman did not exercise reasonable skill and care. If the effect of the evidence be that the terms of the contract were as stated in the first of these three alternatives, I am of opinion that the case would be governed by the decision in *Williams*' case (1), and the appeal would fail. If, on the other hand, the effect of the evidence be that the terms of the contract were as stated in either the second or third alternatives, I am of opinion that the case would be governed by the decision in *Hart's* case (2), and the appeal would succeed.

As regards the first of these alternatives, it is not disputed, and indeed it is pleaded by the plaintiff, that the Uniform List of Prices agreed between the Amalgamated Weavers' Association and the Cotton Spinners' and Manufacturers' Association were incorporated in the plaintiff's contract for service. Further, it was admitted by the plaintiff in giving his evidence at the trial that the standard prices fixed by this list were only applicable when the yarn supplied by the employers was of good quality. It was also explicitly admitted by the plaintiff that these standard prices were

(1) [1906] A. C. 136.
(2) [1928] 1 K. B. 176.

only applicable when the weaving was skilfully and carefully done so as to produce good merchantable cloth. Thus on p. 122 of the shorthand notes of the plaintiff's cross-examination: "(Q.) Do you suggest that these are prices for careless weaving? (A.) No." Again, on p. 123: "(Q.) What I am suggesting to you is that these prices are perfectly well understood by you all to be the prices for work carefully done? (A.) Yes." Again, on p. 133: "(Q.) You knew that those prices in the Price List were the prices for cloth in regard to which you had taken all proper care? (A.) Yes. I took it that these prices paid to me were prices paid for good work." In the face of these admissions, and of the uncontradicted evidence of the defendants, I find myself unable to agree with the finding of Farwell J. that under the plaintiff's contract of service the standard prices fixed by the Uniform List of Prices had been earned and were payable to him, whether the work had been well or ill done, and that the only remedy open to the employers if the plaintiff failed to exercise reasonable care and skill was to dismiss him or to sue him for damages for breach of contract.

That leaves the question whether the second or third alternative view of the plaintiff's contract for service is the true one. If the matter had rested simply on the fact that the prices in the Uniform List of Prices were for good work only the logical result would have been that the true terms of the contract were those mentioned in the second alternative, and that the plaintiff, in the circumstances of the present case, would only have been entitled to a quantum meruit, in which case no question under s. 3 of the Truck Act, 1831, would have arisen. Other factors have, however, to be taken into consideration, and for the reasons mentioned hereafter, I am of opinion that the true terms of the contract were those mentioned in the third alternative. The contention of the employers in support of the third alternative was that the true inference to be drawn from the admitted and proved facts is that reasonable deductions for bad work were an incident of the plaintiff's contract of service, and were properly taken into account in calculating the correct amount of the

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.
Lawrence L.J.

wages earned by or payable to the plaintiff. In my judgment this contention is well founded. The employers based their contention on two alternative grounds: either that the established practice of making reasonable deductions for bad work in the defendants' mill was incorporated into the plaintiff's contract of service by reason of his having agreed to be employed upon the same terms as the other weavers in that mill, or else that the general usage of making reasonable deductions for bad work prevailing in the cotton weaving trade of Lancashire was so well known and understood that every weaver engaging in that trade must be taken to have entered upon his employment on the footing of that usage.

As regards the first of these grounds, it is clearly established by the evidence of Mr. George Ridehalgh that the practice of making reasonable deductions for bad work has continuously prevailed at the defendants' mill for upwards of thirty years, and that during the whole of that time all weavers employed by the defendants have been treated alike in that respect. The practice was therefore firmly established at the defendants' mill when the plaintiff entered upon his employment there. Further, I think that it is clear that the plaintiff accepted employment in the defendants' mill on the same terms as the other weavers employed at that mill. I draw this inference not only from the statement of claim (as explained by the particulars) and from the plaintiff's own evidence, but also from the fact that this action is avowedly brought to test the legality of the practice prevailing at the defendants' mill, and not to determine whether this particular plaintiff was employed upon some special terms which would make that practice inapplicable to his contract of service. Although I entirely agree with the learned judge in finding it difficult to believe that the plaintiff did not know of the existence of the practice at the mill, I think that it is immaterial whether he knew of it or not, as I am satisfied that he accepted his employment on the same terms as to deductions for bad work as the other weavers at the mill.

In the result, I have come to the conclusion that the practice of making reasonable deductions for bad work prevailing at the defendants' mill was incorporated in the plaintiff's contract of service.

Further, I am of opinion that the second ground is also established by the evidence—namely, that the practice in the defendants' mill is in accordance with the general usage of making reasonable deductions for bad work prevailing in the weaving trade of Lancashire, which usage, in the absence of any stipulation to the contrary, would be incorporated into every contract of service as a weaver in a Lancashire cotton mill without special mention. This usage seems to me to receive recognition in the Joint Rules for the Settlement of Trade Disputes appended to the Uniform List of Prices (to which Rules both the plaintiff and the defendants were subject: see p. 3 of the plaintiff's particulars delivered on May 8, 1929) inasmuch as r. 4 expressly provides that in the case of an underpayment by the employer of the Uniform List of Prices where the employer either admits the underpayment or refuses to consent to an inspection of the work, the workman is to be at liberty to take whatever action he thinks fit without the necessity of bringing the matter before either the Local or Central Employers Committee.

The main contention of the plaintiff on this part of the case was that both the practice in the defendants' mill and the general usage in the weaving trade in Lancashire sought to be incorporated into the plaintiff's contract of service were illegal, as contravening the provisions of the Truck Act 1831. In my judgment, this contention is completely answered by the fact that the practice of making reasonable deductions for bad work from wages has been recognized as legal both by the Court of Appeal in *Hart's* case (1) and by the Legislature in at least three Acts of Parliament—namely, the Hosiery Manufacture (Wages) Act, 1874, s. 1, the Employers and Workmen Act, 1875, ss. 3 and 11, and the Truck Act, 1896, ss. 2, 8 and 29. It would serve no useful purpose to repeat what was said by Avory J. in the

(1) [1928] 1 K. B. 176, 178.

Divisional Court and by the members of the Court of Appeal in *Hart's* case (1) on this subject, but I desire to express my respectful concurrence in the view expressed in that case that the Truck Act, 1896, is directed to regulating a practice recognized to be lawfully existing and is not directed to enabling something to be done which could not lawfully have been done previously. As pointed out by Scrutton L.J., s. 8 of the Act would render ss. 1 and 2 wholly ineffectual if the contracts therein referred to were illegal under the Truck Act, 1831. It is significant, on the question of the existence and notoriety of the general usage in the weaving trade in Lancashire, Cheshire, Derbyshire and the West Riding of Yorkshire, to note that in the year 1897 the workmen employed in that trade, being apprehensive that a compliance with the provisions of ss. 1 and 2 of the Truck Act, 1896, might lead to the more rigid enforcement of the usage of making deductions for bad work, persuaded the Secretary of State that the provisions of the Act were unnecessary for their protection, and procured him to make an order under s. 9 granting an exemption from those provisions in respect of the persons engaged in all branches of that trade, thus leaving the usage to continue as theretofore without any of the restrictions imposed by the Act.

Apart from the question of illegality under the Truck Act, 1831, Farwell J. has held that the usage is not a good usage, because it is neither universal nor reasonable nor certain, and accordingly does not comply with the tests laid down in *Devonald* v. *Rosser & Sons.* (2) If I am right in thinking that the plaintiff's contract of service incorporated the established practice at the defendants' mill, the question whether the general usage in the trade is good or bad does not arise, but as I may be wrong on this point, and as the question has been fully argued and dealt with by the learned judge in his judgment, I think it right that I should shortly express my views upon it. In the first place, it is to be noticed that in *Hart's* case (1) the justices found that " deductions for bad work are, and have been

(1) [1928] 1 K. B. 176, 178.

(2) [1906] 2 K. B. 728.

for many years, the usage and custom in the cotton weaving trade of Lancashire, and have always been, and are, an incident of a weaver's contract of service, and have always been, and are, taken into account in calculating the correct wages." The Court of Appeal decided that this usage was not illegal under the Truck Acts and gave effect to it. This decision is binding both on Courts of first instance and on this Court, and in my opinion covers the present case. Further, with all respect for the opinion of the learned judge I do not agree with his decision that the facts given in evidence in this case show that the usage which admittedly has subsisted now for very many years in spite of attempts made from time to time to get rid of it by legislation and strikes, and has been regulated by statute, is bad in law. The learned judge based his decision that the usage was bad because it was not universal on the fact that some of the mill-owners in Lancashire have tried, and some are still trying to do without applying the usage to their mills. This fact, in my judgment, in no way destroys the usage. Channell J., in *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1) says: "When a custom is once established, the fact that persons frequently contract themselves out of the custom would not of itself destroy the custom; but I think the practice of contracting out may become so general as to destroy the custom. When once the custom becomes the exception and not the rule there is no longer a custom." I agree with this statement of the law. The evidence in the present case comes nowhere near to proving that the usage of making deductions for bad work has become the exception in Lancashire. On the contrary, the evidence shows that it still prevails in over 85 per cent. of the mills in that county.

In the next place, I am of opinion that the usage is not, as held by the learned judge, unreasonable. The deductions are not arbitrary deductions at the will and pleasure of the employers; they are limited to cases where there has been bad work, and they are limited to an amount which does not exceed the actual or estimated damage or loss occasioned to the employer by the act or omission of the workman.

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(1) 92 L. T. 332.

The workman is free to prove that his work was good and that no deduction ought to be made, or to prove that any particular deduction exceeds the amount of the actual or estimated damage or loss to the employer. Moreover, the usage comes strictly within what the Legislature has considered fair and reasonable in a contract between workman and employer: see s. 2, sub-s. 1 (*b*), of the Truck Act, 1896. The ground upon which the learned judge held that the usage was bad for uncertainty is because the amount of the deductions for bad work is left to the discretion of the employers, and because the maximum amount of such deductions is the actual loss occasioned to the employers, which could not in most cases be ascertained until after the payment of the wages. In the first place, I think it is clear that the maximum amount of the deduction is not only the actual but also the estimated loss occasioned to the employer, and that the workman is free to dispute the accuracy of such actual or estimated loss. In the next place, a trade usage allowing an employer to make deductions for bad work at his discretion not exceeding a certain defined limit does not, in my opinion, render the usage uncertain. It would be altogether unreasonable if the usage were to make certain definite deductions in every case. There are degrees of negligence, and it is reasonable that employers should not exact the full amount of the loss occasioned to them in every case. From a business point of view there is no uncertainty about such a usage. A Lancashire weaver knows, and has for very many years past known, precisely what his position was as regards deductions for bad work on accepting employment in a Lancashire mill. There would be no uncertainty in his mind on this point as to the effect of his engagement. He no doubt would hope and expect to be treated fairly and sympathetically if he could show reasonable cause why he should be excused for any particular piece of bad work, but he would have no doubt as to the extent of his liability any more than he would have had if he had entered into a written contract embodying the usage under s. 2 of the Truck Act, 1896. Although the Lancashire weavers, as a class, may have objected in principle to the usage for many years past, this is the first case in which it has been suggested that the usage is bad for uncertainty, and in my judgment the suggestion is unfounded.

The only other point that I need mention is that made by Mr. Schiller under s. 116 of the Factory and Workshops Act, 1901. In my opinion, the particulars of the rate of wages to be furnished under sub-s. 1 (*b*) of that section are applicable only to wages for work to be done with reasonable skill and care, as it would manifestly be impossible to give particulars of deductions for bad work before the work had been commenced. Moreover, in view of the statement in para. 10 of the statement of claim that the defendants had complied with the provisions of the section, the point is not open to the plaintiff.

For the reasons stated, I agree that the appeal should be allowed and the action should be dismissed with costs.

ROMER L.J. In this case the respondent, who is in the service of the appellant company as a weaver, is suing for a declaration that a sum deducted from the amount alleged to be due to him as wages under his contract of employment was illegally deducted. It is, therefore, necessary in the first place to ascertain what the terms of that contract were.

The circumstances that led up to the respondent's engagement by the appellants were as follows. In or about the year 1920, when the respondent was of the age of thirteen years, he began attending at one of the appellants' mills at Nelson for the purpose of learning the work of a weaver from his father, who was himself in the appellants' employ in that capacity, and had been so employed for about seven years. After this had been going on for about twelve months the father appears to have suggested to the appellants' manager that his son might enter their service. He asked the manager if the respondent might have two looms. A day or two later the manager took the respondent up to two looms that were not working and said: "Here; I have got two looms for you. I will see how you go on. I will give you a trial."

The respondent accordingly went to the two looms, and has been in the employment of the appellants as a weaver from that time down to the present, working, however, after a time at four looms instead of the two with which he started. Nothing was said about wages or any other term of the respondent's employment. But in my judgment the proper inference in these circumstances is that the respondent was employed upon the same terms as the other weaver employees of the appellant company, including the respondent's father. This indeed is the respondent's own contention. In his statement of claim he alleges that the Uniform List of Prices as amended from time to time governed the terms and conditions of employment of himself and the other employees of the appellants, and in his further particulars he states that he and the appellants were also subject to the rules for the settlement of trade disputes which are bound up in one volume with the Uniform List of Prices. In the alternative he contended that in so far as the terms of his employment were not oral they were implied from a usage obtaining in the employment by the defendants of the plaintiff and the other employees of the defendants, which usage, he says, was in terms identical with the provisions of the agreements. This is, however, merely stating the same thing in a different way.

Now if the Uniform List of Prices and the rules for settlement of disputes or the usage of the appellants are implied terms of the respondent's employment, this can only be because they were the terms upon which the other employees were serving. I regard, therefore, the respondent's allegations in his pleading as admitting that he was engaged upon the same terms as the other employees, an admission that is in accordance with my own conclusion. If this be so, it cannot, I think, be doubted that the practice of paying a weaver, in respect of work carelessly done, a less sum than he would have been entitled to under the Uniform List of Prices had the work been properly done, was imported into the respondent's contract of employment. The respondent alleges that he did not know of this practice at the time of his engagement. But in my opinion this would be immaterial. Entering the appellants' service upon the same terms as the other weavers employed by them, he must be deemed to have subjected himself to those terms whatever they might turn out to be. As a matter of fact, however, Farwell J. said that he felt some difficulty in believing that the respondent did not become aware of this practice before he had been in their employment very long. I feel the same difficulty. It is indeed almost impossible to believe that the respondent did not come to hear of this practice during the twelve months he was in the mill being instructed by his father. Mr. George Ridehalgh has been the manager of the appellants for the last thirty years, and during the whole of that time the practice has been followed. We were not told how often the deductions were made, except for one period between June 22, 1927, and August 10, 1928, in respect of which the wage sheets of the appellants had been examined. But in that period the deductions had been made on fifty-one occasions, and I have no reason to suppose that the period chosen differed materially from any other. It was therefore a not unusual occurrence. But whether the deductions were or were not known to the respondent, there is no doubt that the practice in fact existed in the appellants' mill, and if, as I think, the practice was imported into the respondent's contract of service, the respondent cannot escape from its operation by showing that it lacks some of the essentials of a valid custom or usage of the trade. The only question is whether the practice is rendered illegal by the Truck Act, 1831. The answer to that question depends upon whether the deductions are made for the purpose of calculating and fixing the correct wages of the respondent, or whether they are deductions made from wages already fixed. If they are the former, it has been decided by this Court that in making them the appellants do not contravene the provisions of the Truck Act, 1831: see *Hart* v. *Riversdale Mill Co.* (1), applying *Chawner* v. *Cummings* (2) and *Archer* v. *James*. (3)

(1) [1928] 1 K. B. 176.
(2) 8 Q. B. 311.
(3) 2 B. & S. 61; 31 L. J. (Q. B.) 153.

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.
Romer L.J.

Now the true nature of the deductions is not to be determined by what the parties are in the habit of calling them. That they are usually referred to at the present time as "fines" is as immaterial as the fact that they are said to be made for disciplinary reasons or as a deterrent, or the fact that the appellants do not always insist on making them. The real question is whether the Uniform List of Prices fixes the same wages for good weaving as for bad. Now the List is the result of agreement between the respective representatives of the masters and the men engaged in the trade, and it is prima facie improbable that the prices contained in that List were going to be paid by the employers for anything but merchantable cloth, or were going to be accepted by the employees for weaving anything but merchantable material. It could hardly be expected, however, that the Price List should indicate how much less should be paid for unmerchantable cloth or how much more for unmerchantable material. That would obviously depend upon the facts of each particular case. But one would expect to find something in the Joint Rules to provide for such cases in the event of the employer and employee failing to reach a satisfactory solution; and on turning to the Rules this expectation will be found to be justified. Rule 2 provides for the case of bad material and r. 4 for underpayment of the Uniform List of Prices. Both the List and the Rules, therefore, are quite consistent with the inherent probabilities of the case. But when the evidence is looked at, it appears that the respondent and his employers alike recognize that the prices in the List are prices for merchantable cloth and for weaving with merchantable materials. As regards the latter, the respondent agreed that if the yarn supplied was bad, so putting extra work on the weaver, he was entitled to ask for extra pay. The more important question, however, for the present purpose related to the deductions. As to these, he agreed that the prices in the List were perfectly well understood by all the weavers to be prices for work carefully done. He also said that he took it that the prices were prices paid for good work. This means that the List of Prices fixed his wages for good work

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.
Romer L.J.

alone. That being so, the wages to be paid for bad work were either never determined, in which case he would be paid upon a quantum meruit, or they were determined by reference to the practice in the mill, under which it was in the option of the manager to pay him the wages he would have been paid had the work been good, or those wages less a sum not exceeding the damage accruing to the appellants by reason of the faulty work. In either case the payment of the lower wage would not offend against any provisions of the Truck Act, though for the reasons I have already given I think that his wages for bad work were determined by reference to the usage.

In these circumstances I am of opinion that the case is governed by the decision in the *Riversdale Mill Co.'s* case. (1)

Having arrived at the conclusion that the practice was incorporated in the respondent's contract of employment and that such practice is one which relates to the fixing of the wages for faulty weaving and not to a deduction from wages already ascertained, it is not necessary for me to deal with the other grounds on which the respondent relied. I wish, however, to say a few words about s. 116 of the Factory and Workshops Act, 1901, upon which the respondent placed some reliance. His contention, as I understood it, was that, inasmuch as the particulars furnished to him in writing under sub-s. 1 (*b*) of that section contained no reference to any diminution of the wages shown in the particulars and placard for faulty work, those wages must be deemed to be the wages payable to him whether his work were well or ill done. It is, however, to be observed that the particulars to be given are those of rates of wages applicable to the work to be done by him, and are to be furnished when the work is given out to him; that is, of course, before he has begun weaving. The particulars required would, accordingly, appear to be particulars of the rate of wages payable for the work that he is expected to do —namely, good work and nothing else. The particulars in writing furnished to the respondent appear to me, therefore,

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(1) [1928] 1 K. B. 176.

C. A.
1930
SAGAR
v.
H.
RIDEHALGH
& SON, LD.
Romer L.J.

to have been a sufficient compliance with the section. It is indeed to be observed that the section requires the particulars of the rate of wages applicable to the work "to be done" to be furnished for the purpose of enabling the worker to compute the total amount of wages payable to him in respect of his work, which would seem to mean the work actually done by him. Once given the rate of wage payable for the work that he was expected to do, the operative would have no difficulty in computing what he would be entitled to for the work actually done. The fact that the employer might nevertheless be generous enough to pay him as though his work were properly done is immaterial.

For these reasons, I agree that the appeal should be allowed, with the consequences stated by the Master of the Rolls.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co., for John Taylor & Co., Manchester; Stow, Preston & Lyttelton, for Waddington & Son, Burnley.*

H. C. G.

In re PHILLIPS.

MAUGHAM
J.

1930
Nov. 5.

LAWRENCE *v.* HUXTABLE.

[1929. P. 1508.]

Power of Appointment—General Power—Exercisable by Deed with consent of Trustees—No Duty on Trustees to select Persons to benefit by exercise of Power—Equitable Assets.

Under a settlement a fund was given to such persons, after the death of A., as he should, with the consent of the trustees, appoint by deed:—

Held, that the power was a general power, and that the power having been exercised, the fund was equitable assets for the payment of A.'s debts, notwithstanding that the consent of the trustees to the exercise of the power was necessary.

ACTION.

In this action the plaintiff claimed a declaration that the property comprised in certain settlements was assets for the payment of 10,000*l.* payable to him as sole surviving trustee of an indenture of settlement, dated July 18, 1899, together with interest thereon at the rate of 4*l.* per cent. per annum computed from the date of the death of the testator. The testator executed a number of settlements, the principal one being the settlement of July 18, 1899. By that settlement he covenanted with the trustees to pay to them within ten years from the date of the settlement, or in case he should die before the payment should have been made, then that his heirs, executors or administrators should within three calendar months after his death pay to them the sum of 10,000*l.* and interest thereon at the rate of 4*l.* per cent. per annum computed from the day of the death of the testator. This was a settlement made in contemplation of a marriage between the testator and Adelina Florence Hodder. The marriage was duly solemnised on July 19, 1899, and there was issue one daughter, who was born on April 10, 1900.

The testator was entitled under an indenture dated April 25, 1904, and a number of other indentures of settlement, to certain powers of appointment. The power of appointment in the settlement of April 25, 1904, was to the effect that after the death of the testator (subject to certain trusts for the benefit of one William John Phillips and his wife and children, which, owing to the death of W. J. Phillips, a bachelor, were not material) it was declared that the trustees should stand possessed of the settled premises and of the income thereof and of all accumulations thereof in trust for the person or persons and for the purposes and generally in such manner as the testator should, with the written consent of the trustees or trustee, by any deed or deeds revocable or irrevocable direct or appoint. There were a number of similar powers, not differing in any material respect, but relating to different items of property, contained in a number of subsequent settlements.

By a deed poll dated August 28, 1925, the testator, with the consent in writing of the trustees for the time being of the settlement of April 25, 1904, after revoking certain revocable appointments, appointed that after the failure or determination of the trusts declared by the settlement having priority to the power of appointment, the trust funds and property subject to the trusts of the settlement should be held by the trustees upon trust to pay certain pecuniary sums, including a certain annuity and subject as aforesaid upon trust for accumulation for a period of twenty-one years from the death of the testator, and then upon certain trusts in favour of the testator's daughter and her issue, with certain gifts over in the event of there being no child or other issue of his daughter who should attain a vested interest.

By a deed poll dated April 30, 1926, the testator revoked some of the appointments of pecuniary sums made by the deed poll of August 28, 1925, and appointed in effect the whole of the sum of 10,000*l.* in varying amounts to the persons therein mentioned.

The testator died on September 4, 1928. Shortly after his death notice was given by the plaintiff of his claim against the estate of the testator for the sum of 10,000*l.* and interest payable under the covenant contained in the settlement, to the defendants' solicitors. The defendants were the surviving trustees of the various settlements, beginning with the settlement of April 25, 1904, and they were the executors of the will of the testator. The defendants' solicitors informed the plaintiff's solicitors that the free property of the testator would not amount to more than 1000*l*., and thereupon, after a short period, the plaintiff's solicitors gave notice to the defendants that they claimed a sum of 10,000*l*. and interest and required them to make due provision for the same.

Archer K.C. and *Danckwerts* for the plaintiff. This case falls within the doctrine that the donee of a general power cannot appoint the fund to a volunteer without paying his debts. As the donee is in no sense in a fiduciary position, it is against conscience that he should use the fund to make a gift when he might use it to pay his debts, and the Court of equity will therefore stop the fund in transitu so far as necessary to pay the debts of the donee, treating the fund as equitable assets: see Williams on Executors, 12th ed., vol. ii., p. 1083; *Lord Townshend* v. *Windham* (1); *O'Grady* v. *Wilmot.* (2) It is true the power is only exercisable with the consent of the trustees, but there is nothing to show that they had any duty of selection to perform, and the necessity for their consent to a formal matter is not sufficient to make the power other than a general one for the present purpose: compare *In re Dilke.* (3) Nor does it matter that the power is to appoint by deed and not by will. The exercise of the power could only take effect, having regard to the form of the limitations, at the death of the donee, so that the reason for applying the doctrine exists to the full. If the donee had had power to appoint by deed inter vivos and had done so there might be a difficulty in applying the doctrine, but no such question arises in the present case.

Swords K.C. and *Andrew Clark* for the defendants. This is a limited and not a general power. *In re Dilke* (3) was a very special case, and did not lay down any general principle. A general power is an absolute power, which is property, and can be treated as the appointor's property: see Buckley L.J. in *In re Fane.* (4) That follows the statement of Lord

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(1) (1750) 2 Ves. Sen. 1.

(2) [1916] 2 A. C. 231.

(3) [1921] 1 Ch. 34.

(4) [1913] 1 Ch. 404, 413.

Hardwicke in *Lord Townshend* v. *Windham.* (1) Sect. 27 of the Wills Act, 1837 (1 Vict. c. 26), puts property over which the appointor has a general power of appointment in the same position as his own property : see Theobald on Wills, 8th ed., p. 262. Any restriction on the power prevents its being a general power : *In re Tarrant's Trust* (2) and *In re Byron's Settlement.* (3) In the present case the trustees have power to refuse consent to persons named by the appointor, if they think it is their duty to do so. They have a duty as well as a power. They owe a duty to the persons entitled in default of appointment where the power of appointment is not properly exercised : *Eland* v. *Baker.* (4) Therefore the power here is a limited, and not a general power. The appointor could not appoint to himself and therefore he could not appoint to his creditors.

MAUGHAM J. The question that arises for determination in this action is this. Is the plaintiff right in claiming that the property comprised in the settlements beginning with the settlement of April 25, 1904, which was subject to the powers of appointment of the testator and which he has exercised in favour of a volunteer, liable to be applied in satisfaction of the debt arising by the covenant to pay the sum of 10,000*l.* and interest contained in the marriage settlement of July 18, 1899 ; or, on the other hand, are the defendants right when they allege that the powers of appointment conferred upon the testator are not general powers for the reason that they could only be exercised with the consent of the trustees for the time being of the settlements, with the result that the property appointed is not assets for payment of any of the debts of the testator, including of course the debt arising by the failure to pay the sum of 10,000*l.* ?

Now, the law on the subject is law which is in effect governed by authority, with the possible exception of the precise matter which arises for decision. There is old authority that if a testator made an appointment under a

(1) 2 Ves. Sen. 1, 9, 10.
(2) (1889) 58 L. J. (Ch.) 780.
(3) [1891] 3 Ch. 474, 478, 479.
(4) (1861) 29 Beav. 137, 141, 142.

general power of appointment in favour of a volunteer, creditors of the testator could by instituting proceedings in Chancery satisfy their claims out of the appointed fund, to the extent to which the other assets of the testator proved insufficient for this purpose. This principle was laid down well over 100 years ago in the case of appointments made by will under a general power. The basis of the rule is accurately stated in Williams on Executors and Administrators (1): "The basis of this rule was that the appointor could have exercised the power in favour of his creditors, and that the claims of creditors were regarded in equity as paramount to the claims of a volunteer. It was inequitable that the appointor should confer a benefit upon a volunteer whilst his creditors remained unsatisfied." In *Lord Townshend* v. *Windham* (2) the matter came for consideration before Lord Hardwicke. In that case there had been a general power of appointment made, not by will, but by deed. Lord Hardwicke was dealing with a case where the appointment operated to transfer the property on the death of the appointor. He considered in a somewhat elaborate manner the effect of an appointment under a general power, and he accepted the doctrine which had been laid down, that where there was a general power of appointment of a sum of money to charge the estate of a third person, which it was absolutely in his pleasure to execute or not, he may do it for any purpose whatever, and appoint the money to be paid to himself or his executors if he so pleased; and then he added this (3): "If he executes it voluntarily without consideration, for benefit of a third person, this shall be considered as part of his assets, and his creditors have the benefit of it. Nor does it differ, whether it is a power to charge a sum of money on land, or to create a chattel interest out of land; for it will depend on the same foundation, provided it is a general power, which he may execute for any purpose; for if it is a power to appoint a sum among other persons, who are at all described by the power, so that it is not absolutely in his power to do it for himself,

(1) 12th ed., vol. x., 1083.

(2) 2 Ves. Sen. 1.

(3) 2 Ves. Sen. 1, 9, 10.

there is no pretence that his creditors could have the benefit of it. Consider how the present differs from any of those cases; and notwithstanding I have endeavoured to find a difference, I do not see a substantial one to ground a different rule upon in point of justice. The rules of this Court"—he was, of course, dealing with the Court of Chancery—"are established so far as they can, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors; and the Court has extended it of late: and though an unfortunate case may arise in the case of children, for whom parents are by nature bound to provide, it is impossible to say the consideration in respect of them is of so high a nature as that of paying just debts; and therefore the Court never preferred them to just creditors, who might otherwise be defeated of a satisfaction for their debts. On that ground was *Shirley* v. *Lord Ferrers* (1), which has been allowed ever since, and is agreeable to *Lassells* v. *Lord Cornwallis*. (2) A distinction was endeavoured, that the appointment by Lord Ferrers was by will, this by deed; because whoever takes by will, takes as a legacy; but that is not a material distinction; for if established, the justice intended by the Court in these cases would be avoided in every instance; as then it would be putting it barely on the form of the conveyance, and elude the rule of justice." Then he points out that there is no substantial ground for a distinction, "for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will; it is therefore a slight and shadow of distinction only." Then he goes into the other considerations, and then he explains (3) the ground, as he conceives it, why the Court has acted in the way in which it has acted, and remarks that on that foundation (3) "this Court has grounded their opinion in the execution of powers, when they stop in transitu (as it is called) and says, it shall not be given

(1) (1733) 7 Ves. 503n.

(2) (1704) 2 Vern. 465.

(3) 2 Ves. Sen. 11.

away from creditors"; and in the result he held that the donee of the power (1), "having executed it, so as to gain the interest to himself, and attempted to pass it at the same time to his daughter, the Court will not suffer it."

I have read that judgment at some length because it is clear that the House of Lords, in *O'Grady* v. *Wilmot* (2), placed great reliance upon the decision and upon the language used by Lord Hardwicke, and I think I may take it that practically the whole of what Lord Hardwicke said was accepted by the House of Lords.

The question, therefore, which I have to decide here is the question whether, in a Court of equity, the Court will interfere between the appointees under the power which existed in the present case, and stop the fund, as Lord Hardwicke says, in transitu for the benefit of creditors. The assets are assets in equity only, and any part of the fund not necessary for the payment of creditors, would, of course, go, if there were anything over, to the appointees.

It must be observed that this is not a case under s 27 of the Wills Act, under which section, as I conceive it, different considerations might well arise. In s. 27 of the Wills Act the words "general powers" are not used; the phrase is "property which the testator may have power to appoint in any manner he may think proper." It has been held that a power to appoint by will expressly referring to the power, is not within s. 27. That was decided in *In re Tarrant's Trust* (3) and in *Phillips* v. *Cayley* (4), overruling a decision to the contrary in *In re Marsh.* (5) It has also been held that a power to appoint generally, with the exception of a specified person or specified persons, is not a power within the section: *In re Byron's Settlement.* (6) The Courts in those cases were dealing with the true construction of the words of a statute; and I respectfully assent to those decisions.

In considering, in the present case, whether the Court as a Court of equity can intercept the fund or the property, it

(1) 2 Ves. Sen. 11.
(2) [1916] 2 A. C. 231.
(3) 58 L. J. (Ch.) 780.
(4) (1889) 43 Ch. D. 222.
(5) (1888) 38 Ch. D. 630.
(6) [1891] 3 Ch. 474.

may be useful to consider what was the duty or the power of the trustees whose consent was necessary to the exercise of the power. Was there imposed on them a duty towards the persons entitled in default of appointment? That may be put in another form: Could the persons entitled in default of appointment have brought an action for breach of trust against the trustees who gave their consent to the exercise of the power, if they could establish that the trustees had not exercised any discretion in the matter as regards the persons who were to benefit by the proposed exercise of the power? In my opinion the answer to this question must be in the negative, and I think *Eland* v. *Baker* (1), a decision of Lord Romilly's, is distinguishable. My view is that the trustees in such a case have, it is true, a power of veto to the exercise of a power, but they are not persons in whom the discretion as to the selection of the objects of the power is reposed; they have no duty to select, and they are entitled, if they think fit, to assent to the exercise of the power by the donee of it, leaving to him the free exercise of the power which has been reposed in him.

The matter is not untouched by authority. The Court of Appeal approved of a decision of Peterson J. in *In re Dilke.* (2) They were there considering the question, not whether the property appointed had become assets for the payment of debts, but the question whether, where there was a power of appointment to be exercised only with the consent of certain trustees, the trustees were bound to consider and approve the persons in whom it was proposed that the power of appointment should be exercised; or, on the other hand, was the right view this: that the consent of the trustees was merely to the exercise of the power, and not to the selection of the individuals to be benefited.

Now it is true that in that case the settlement was one under which Sir Charles Wentworth Dilke, a person of unsound mind, not so found by inquisition, was tenant for life. The settlement was dated December 1, 1914, and by it a sum of 48,000*l.* was vested in trustees upon trust to pay the income to Sir Charles Wentworth Dilke during his life, and after his death, subject to certain trusts which failed, "in trust for such person or persons as the" tenant for life, with the consent and concurrence of certain persons who were trustees, should by deed personally appoint, "and in default of and so far as any such appointment shall not extend or operate then as to the sum of 15,000*l.* and the estate duty thereon as the" tenant for life should by any existing or future will appoint. Peterson J. pointed out, and I think to some extent at any rate relied upon, the circumstance that Sir Charles, at the date of the original deed, was not of sound mind; and said that it might well be that the real intention of the provision was that the question whether Sir Charles was competent to exercise the power of appointment should be considered by the trustees. In the Court of Appeal, however, where I have the advantage of the judgments of Lord Sterndale M.R. and Warrington and Younger L.JJ., I do not find that any of their Lordships laid stress upon the circumstance that Sir Charles was at the date of the settlement a person of unsound mind not so found, and I think that the judgments are based upon a consideration of the frame of the words creating the power, and in particular the circumstance that under the words that there existed the selection was left to Sir Charles, and that upon the natural meaning of the words it was impossible to arrive at the conclusion that the trustees had to exercise a discretion as to the persons to be benefited by the exercise of the power, the more natural meaning of the words being that the consent of the trustees was merely to the exercise of the power by the donee of it. Stated in other language, their consent was required to the appointment to give validity and effect to the appointment, but there was no reason for holding that they had any duty as regards the selection of the objects of the power.

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(1) 29 Beav. 137.

(2) [1921] 1 Ch. 34.

On the fair reading of the judgments in that case, I think I am justified in taking them as supporting my own view, that trustees in such a case as this are not concerned to consider the propriety of the appointment in the sense of

MAUGHAM J.
1930
PHILLIPS, *In re.*
LAWRENCE *v.* HUXTABLE.

exercising their own opinion as regards the selection of the objects by the donee of the power.

Having said that, I return to the question which I conceive I have to decide. Ought the Court, consistently with the decisions, to stop in transitu, or to intercept the fund appointed by the testator in such a way that it has been given away from the creditors of the testator? In my judgment the equity extends to the present case. When once the conclusion is arrived at that the trustees are not bound to exercise their own discretion as to the persons to be benefited by the exercise of the power, I think it necessarily follows that the equity of the creditors is as strong as if it were an unfettered general power which the testator could exercise without consent. Accordingly, I must hold in favour of the contention which has been put forward on behalf of the plaintiff in this case.

Solicitors for the plaintiff: *Church, Adams, Tatham & Co., for Colborne, Coulman & Lawrence, Newport, Monmouthshire.*

Solicitors for the defendants: *John T. Lewis & Woods, for Frank Lewis & Son, Newport, Monmouthshire.*

P. J. B.

ed. *Re* BIRKETT (*decd.*). [1950]
E.R. 316.

owed. *In re*
KETT, DECD.
[1950] 1 Ch. 330

In re DALE.

MAYER *v.* WOOD.

[1930. D. 2106.]

LUXMOORE J.

1930
Nov. 28;
Dec. 19.

Will—Codicil—Construction—Gift—Trust for Sale—Proceeds to be divided "equally between the children of my son A. and my daughter B."

By his will a testator gave all his residuary real and personal estate to his trustees upon trust to pay the rents, profits and income to his wife for life and after her death upon trusts for sale and to divide the proceeds into two equal portions, one to be paid to his son A. and the other on certain trusts for his daughter B. and her children as therein mentioned.

By a codicil the testator, after reciting that since the date of his will he had purchased a freehold house, devised the same on trust for his wife for life and on her death for E. Bridger for life. He then directed his trustees on these events happening to sell the house and "divide the proceeds thereof equally between the children of 'my son A. and my daughter B.'"

A. was married, with one child, a son. B. was also married, and had six children. A.'s son having died, his legal personal representative was one of the defendants to the summons. One of B.'s children, a son, also died, and his legal personal representative was also a defendant:—

Held, that although on the authorities a gift to be equally divided between the children of A. and B. ought, in the absence of surrounding circumstances, to be construed as a gift in equal shares to the individual B. and the children of A., the construction must in each case depend on the particular context and all the surrounding circumstances.

Held, that the gift in the codicil included all the testator's grandchildren, both A.'s and his daughter B.'s children, and that accordingly the proceeds of sale were divisible in sevenths.

ORIGINATING SUMMONS.

By his will dated August 1, 1867, James John Dale (hereinafter called "the testator"), after appointing his wife Elizabeth Dale, Robert Lloyd Williams and John Matthew Stedwell executrix and executors thereof; and after directing that all his just debts funeral and testamentary expenses be fully paid with all convenient speed after his death, and after various devises and bequests therein mentioned, devised bequeathed and appointed all the rest residue and remainder of his real and personal estate, whatsoever and wheresoever which he had power to dispose of by will, unto the said Robert Lloyd Williams and John Matthew Stedwell their heirs executors and administrators respectively upon trust either to retain such part of the personal estate as might be invested at the time of his decease in its then state of investment or to vary the securities for others of a like nature or of the kind thereafter mentioned as they should think proper, and to invest such part of the said personal estate as might consist of money in or upon the securities therein mentioned. And the testator further directed that his trustees and the survivor of them his heirs executors or administrators and their or his assigns should stand seised and possessed of such real and personal estate upon trust to pay the rents and profits dividends interest and income thereof to his wife during her life, and after her decease to sell the same and out of the proceeds to arise from such sale to pay the sum of one thousand pounds to his sister in law Emily Bridger for her separate use. And upon further trust to divide the residue of such proceeds into two equal portions one whereof should be paid to his son Walter James Dale and the other should be held upon trust for his daughter Matilda Ann Wood for her separate use during her life and her receipts alone should be a sufficient discharge but she should not have power to anticipate the income thereof, and after her decease upon trust for all or such one or more of her children as she should by deed or will appoint and in default of appointment upon trust for all or any of her children as therein mentioned. Provided also that no child should share in the unappointed premises without bringing into hotchpot and accounting for the share or shares appointed to him or her. And in default of children taking the said premises in default of appointment then upon trust for such person or persons as the said Matilda Ann Wood should by will appoint and in default of appointment upon trust for his said son his executors administrators or assigns.

The testator made a codicil dated August 3, 1875, to his said will, whereby after reciting that subsequently to the date and execution of his will he had purchased the dwelling-house and premises at Upper Teddington in which he was then residing and which premises had been duly conveyed to him and his heirs for an estate of inheritance in fee simple, he gave and devised the said freehold premises unto and to the use of Robert Lloyd Williams and John Matthew Stedwell their heirs and assigns upon trust that after his decease his wife should have the use and occupation of the same for and during her life if she should feel so disposed, but in the event of her being desirous of residing elsewhere he directed his trustees to pay the rental of the said premises after deducting all necessary outgoings for insuring and keeping the same in repair to his said wife for her life, and after her decease he directed his trustees to pay the rental to his sister in law Emily Bridger for and during her life or until she should marry but on her marriage or death then "I direct my said trustees to sell the said messuage or dwelling-house and premises and to divide the proceeds thereof equally between the children of my son Walter James Dale and my daughter Matilda Ann Wood." And the testator ratified and confirmed his said will in every other respect.

The testator died on May 7, 1877, and his will and codicil were duly proved on June 18, 1877, in the Principal Probate Registry by all his executors. The testator's widow Elizabeth Dale died on October 11, 1890.

The testator's son, Walter James Dale, was married once only and had one child, a son, Walter Arthur Dale. Walter Arthur Dale (the grandson of the testator) died on October 21, 1907, having by his will dated June 5, 1891, appointed one Robert William Low and another to be his executors. Probate was granted to Robert William Low alone on January 16, 1908. Robert William Low died intestate on January 26, 1909, and on July 30, 1930, letters of administration de bonis non with the will of Walter Arthur Dale annexed were granted out of the Principal Probate Registry to one of the defendants to the summons, one James Bartlett H. Low.

The testator's daughter, Matilda Ann Wood, by her marriage to one Edward Wood in 1853 had six children—namely, Walter James Wood and the defendants to the summons, Alice Matilda Wood (wife of George Lionel Wood), Edward F. Wood, Harold Wood, Kate Harlock and Sydney Wood.

Matilda Ann Wood died on January 29, 1905, having by her will dated March 19, 1894, appointed the defendant to the summons, George Lionel Wood and her son Walter James Wood executors thereof, who duly proved the same on March 4, 1905, in the Principal Probate Registry.

Walter James Wood died on February 13, 1930, having by his will dated June 12, 1927, with a codicil thereto appointed the defendant to the summons, one Ronald Walter Wood, executor thereof, who duly proved the same on May 3, 1930, in the Principal Probate Registry.

Emily Bridger died a spinster on October 19, 1929.

The freehold property mentioned in the codicil of the testator James John Dale was all sold and disposed of shortly after the death of Emily Bridger, except a small portion which had been compulsorily acquired by a tramways company in 1904. The proceeds of sale were partly represented by certain stock and partly by moneys placed to a deposit account at a bank.

The plaintiffs as the present trustees of the will and codicil of the testator James John Dale took out an originating summons for the determination (inter alia) of the question, 1, whether on the true construction of the codicil and in the events which had happened: (*a*) the funds and property representing the net proceeds of sale of the freehold dwelling-house devised by the codicil to the trustees therein named were together with the income thereof since the death of Emily Bridger divisible into seven equal shares, of which one share was payable and transferable to each of the defendants Alice Matilda Wood, Edward F. Wood, Harold Wood, Kate Harlock and Sydney Wood, and one share was payable and transferable to the defendant Ronald Walter Wood as the personal representative of Walter James Wood, and the remaining one share was payable and transferable to the defendant James Bartlett H. Low as the personal representative of Walter Arthur Dale, or (*b*) who was entitled and in what shares and proportions and in what respective capacities and for what interests to the said funds and property and income.

G. Solomon for the plaintiffs.

J. F. W. Galbraith K.C. and *C. J. Parton* for the defendants George L. Wood and James Bartlett H. Low. The proceeds of sale are divisible equally between these two defendants. A gift equally between the children of A. and B. is a gift to B. individually and those persons who are the children of A. The cases have laid down this principle. The prepositions "of" or "to" before B., which would make the gift clear, are in this codicil absent: *In re Walbran* (1); followed by Clauson J. in *In re Prosser* (2); *In re Harper*. (3) A principle runs through all these cases: see *Lugar* v. *Harman* (4); *Peacock* v. *Stockford* (5), where Turner L.J. discusses *Lugar* v. *Harman*. (4) These were relied on by Jessel M.R. in *Hawes* v. *Hawes* (6); and see *Mason* v. *Baker*. (7)

[They also referred to *In re Featherstone's Trusts* (8); Theobald on Wills, 8th ed., pp. 329, 330, para. 8; Jarman on Wills, 7th ed., chap. xlii., pp. 1687, 1693, 1694].

F. D. Morton K.C. and *Meyrick J. L. Beebee* for all the remaining defendants. All the surrounding circumstances existing at the death of the testator should be regarded. It cannot be seriously contended that the testator intended to benefit his daughter alone and not her children. The words used should be read in their grammatical sense. The phrase is a usual one, and unless special circumstances can be shown to exist negativing the ordinary meaning attached to the expression, "the children of A. and B.," the testator here must be taken to have meant all his grandchildren, both his son's children and his daughter's.

Cur. adv. vult.

Dec. 19. LUXMOORE J. The question raised by this originating summons is one of construction arising on a codicil to the will of one James John Dale. The question arises with regard to the gift of the proceeds of sale of a freehold house at Upper Teddington given by the testator to his trustees on certain trusts, the material trust being the trust which is to take effect after the marriage or death of the testator's sister in law Emily Bridger. The trust is expressed in these words: "On her" (that is Emily Bridger's) "marriage or death then I direct my trustees to sell the said messuage or dwelling-house and premises and to divide the proceeds thereof equally between the children of my son Walter James Dale and my daughter Matilda Ann Wood." The testator's will was made on August 1, 1867, and the codicil was dated August 3, 1875. At the date of the codicil the testator's son Walter James Dale was married and had one child; the testator's daughter Matilda Ann Wood was also married, her husband was living, and they had six children.

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(1) [1906] 1 Ch. 64.
(2) [1929] W. N. 85.
(3) [1914] 1 Ch. 70.
(4) (1786) 1 Cox, 250.
(5) (1853) 3 D. M. & G. 73, 78.
(6) (1880) 14 Ch. D. 614, 617, 618.
(7) (1856) 2 K. & J. 567.
(8) (1882) 22 Ch. D. 111.

There are three possible constructions. First, that the gift is, in the events that have happened, to the legal personal representatives of the one child of Walter James Dale and to the legal personal representative of Matilda Ann Wood in equal shares. The second construction is that the gift is in the events that have happened divisible into seven shares, one to each of the six children of Matilda Ann Wood or their legal personal representatives, and the remaining seventh to the legal personal representative of the child of Walter James Dale; while the third construction is that one-half share goes to the legal personal representative of the child of Walter James Dale, and the other half share goes equally between the six children of Matilda Ann Wood or their legal personal representatives.

I reserved judgment to examine the decided cases carefully, because it was said by Mr. Galbraith on behalf of the last two defendants—George Lionel Wood and James Bartlett H. Low—who are respectively the surviving legal personal representative of the testator's daughter Matilda Ann Wood, and the legal personal representative of Walter Arthur Dale (the only child of the testator's son Walter James Dale), that those decided cases laid down a principle of construction which required the Court to hold that a direction to divide a fund equally between the children of A. and B. means a division per capita between the individual B. and the respective persons who answer the description, "the children of A." Mr. Galbraith admits that in the case of a gift to the children of A. and B. there is, in any event, ambiguity, because on a strict grammatical construction of the phrase it is necessary to supply some word. He says strictly you must supply before the name B. either the preposition "of" or the preposition "to," and that that case differs entirely from the present, where there is no gift apart from the direction to divide. In such a case he says there is no need to supply any word, because the phrase, if read literally, is strictly and grammatically complete.

I was referred to a number of cases beginning with *Lugar* v. *Harman*. (1) In that case the gift in question was of a residue to be divided equally amongst "all and every the child and children of my late cousin Edward Lugar and my cousin Philip Fearis and their lawful representatives." The Master of the Rolls decided that the residue belonged to the plaintiffs, the four children of Edward Lugar and to Philip Fearis himself in equal shares. He said that the construction could not be to give the residue to the children of Edward Lugar and to the children of Philip Fearis, "for in that case you must at least understand the word 'of' (viz., the children of my late cousin Edward Lugar and of my cousin Philip Fearis), whereas the words as they stand have a plain grammatical sense, viz., to the children of Edward Lugar and to Philip Fearis himself." It is to be observed that Edward Lugar and Philip Fearis each bore the same relationship to the testator and that Edward Lugar was dead while Philip Fearis was alive. Mr. Vaughan Hawkins in his book on Wills—I quote from the original edition (1863), pp. 113, 114—says this: "According to *Lugar* v. *Harman* (1) and a dictum in *Peacock* v. *Stockford* (2), a gift to or in trust for 'the children of A. and B.' must be read as a gift to B. and not to his children, on account of the non-repetition of the word 'of,' before the word B. But although it may be more idiomatic to speak of 'the children of A. and of B.,' it may perhaps be doubted whether usage requires the repetition of the particle."

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(1) 1 Cox, 250.

(2) 3 D. M. & G. 73, 78.

In *Mason* v. *Baker* (1) Sir William Page Wood V.-C. dealt with *Lugar* v. *Harman* (2), and pointed out that the circumstance that Edward Lugar was dead at the date of the will made the construction arrived at by the Master of the Rolls a reasonable one; and dealing with the particular gift before him (which was the gift of the residue to "all the children of my brother Richard Baker and my sister Mary Mason, to be equally divided amongst them, share and share alike"), goes on to say: "There is nothing on the face of this will which makes it probable that the testatrix meant to treat her sister Mary differently from her brother Richard in this bequest; and unless the genius of our language is opposed to it, I should think the construction was, that this was a gift to the children of Mary to share equally with the children of Richard. I can scarcely say that it is idiomatic English, to use the expression 'I give to the children of A. and B. in equal shares,' meaning to give to the children of one and of the other of them; but on the other hand, the other construction seems to me equally to require the introduction of the word 'to,' and, on the whole, seeing that this brother and sister of the testatrix are placed in exactly the same position in other parts of the will, I see no reason for preferring the parent in one case and not in the other, and I must, therefore, hold that the children of Richard and Mary take this residue equally." The Vice-Chancellor seems to me to take the view that there is ambiguity in the gift, whether it is to be found in the direction to divide between the children of A. and B. or in the form of a gift to the children of A. and B.

In *In re Featherstone's Trusts* (3) Kay J. had to determine the meaning of a gift of residue "unto and equally amongst all the children of my said brother in law Dr. John Dowson and the said Robert Abbey of Coatham." Robert Abbey was one of the four children of Thomas Abbey, who was described by the testator "as his late relative." Robert Abbey himself in fact predeceased the testator, leaving eleven children living at the testator's death. The learned judge in the course of his judgment says this: "On the proper grammatical construction of the words used it would be necessary in order to enable the children of Robert Abbey to take, to insert the word 'of' so that it should read the children of Dr. Dowson, and 'of the said Robert Abbey.' In *Lugar* v. *Harman* (1) where the gift was to the children of E. L. and 'my cousin P. F. and their lawful representatives,' it was held that the gift was not to the children of P. F., but to P. F. himself, and the children of E. L., all taking equal shares." It will be observed that he treated the gift in *Lugar* v. *Harman* (1) as if it was a gift, "to the children of E. L. and P. F.," and made no distinction between this kind of gift and a gift contained in a direction to divide the subject-matter between the children of E. L. and P. F.

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(1) 2 K. & J. 567, 570.

(2) 1 Cox, 250.

(3) (1882) 22 Ch. D. 111, 114.

In *In re Walbran* (2) the gift to be construed was a gift of proceeds of sale, "to be equally divided between the children of Francis M. Walbran . . . . and James C. Walbran . . . ., or their heirs." Francis M. Walbran and James C. Walbran were nephews of the deceased husband of the testatrix. Francis Walbran had six children living at the death of the testatrix, James Walbran had two children living at the death of the testatrix. Joyce J. held that the gift must be construed as a gift to James Walbran and the children of Francis Walbran, and that the division was in moieties, one going to James and the other to the six children of Francis. Joyce J. said in the course of his judgment: "Notwithstanding anything that may have been or may be said to the contrary, I do not doubt that the proper grammatical meaning of the expression 'the children of A. and B.'—the preposition 'of' not being repeated before B., and A. and B. not having or being capable of having children together—is, the children of A. and the individual B., not his or her children.

(1) 1 Cox, 250.

(2) [1906] 1 Ch. 64, 66.

But the expression 'the children of A. and B.' may mean the children of A. and the children of B.; and, in a will, must have that meaning if B., to the knowledge of the testator, be dead, leaving children still alive. In the present case A. and B. are both alive. Each is a nephew of the testatrix. But A., i.e., Francis, had deserted, or, at all events, was living away from, his family. On the other hand, no reason has been suggested why the testatrix should have passed over B.—that is James—in favour of his children. I hold therefore that the division must be between James—not his children—and the children of Francis." It is plain from this that Joyce J. drew no distinction between a gift to the children of A. and B., and a gift to be divided between the children of A. and B. He pointed out on the strict grammatical construction that a gift to the children of A. and B. is the children of A. and the individual B. But he pointed out that the expression is frequently of ambiguous meaning. It seems to me that the decisive factor in the case before him was the fact that Francis Walbran had ceased to reside with his children whom he had apparently abandoned, whilst no such conduct could be attributed to James Walbran.

In *In re Harper* (1) Sargant J. had to construe a gift "to be divided equally between the unmarried daughters of my brother in law Dr. J. Harper and Dr. A. S. Grant equally." In the headnote it is stated that the learned judge followed *In re Walbran* (2) on this point. I do not think this is correct. Sargant J. said that he could not see that the construction of a gift to the children of A. and B. as a gift to the children of A. and of B., or as a gift to the children of A. and to B., was more grammatical or idiomatic in the one case than the other, and he expressed the view that either construction was equally permissible. He in fact decided that the gift before him must be construed as a gift to the three unmarried daughters of Dr. J. Harper and to Dr. A. S. Grant personally, each taking one-fourth. The decision turned entirely on the particular facts of the case, the decisive factors being that Dr. Grant was not related in any way to the testatrix and had

(1) [1914] 1 Ch. 70, 73.

(2) [1906] 1 Ch. 64.

in fact only one daughter, an infant, about four years of age, when the will was made, while Dr. Harper was her brother in law with five daughters, three of whom were unmarried at the date of the will and death of the tenant for life.

The last case referred to was *In re Prosser.* (1) It is only reported in the Weekly Notes, but the report there is in all respects a complete report. Clauson J. had to determine the meaning of a gift to be equally divided between the children of my brother Frederick and John Prosser. Clauson J. followed *In re Walbran* (2), because he found the words were precisely the same.

In my judgment the result of the authorities seems to be that in the absence of any context or surrounding circumstances, a gift to the children of A. and B. in equal shares, or to be equally divided between the children of A. and B., should be construed as a gift in equal shares to the individual B. and the children of A. But it is worthy of note that even in the cases where the strict rule of construction has been recognized, it has been adopted in particular circumstances which themselves admit of no doubt but that the strict construction was in complete accordance with the context and the intention of the testator. I think it is fair to say that either phrase may be ambiguous and that the ambiguity which necessarily arises from the context or surrounding circumstances, is to be solved by that context or by those circumstances.

As Joyce J. said in *In re Walbran* (2), in order to understand what the testator meant by the words in question in that case, it is necessary to know something about the persons mentioned. In the present case the testator had one son Walter James Dale, and one daughter Matilda Ann Wood. Each was married. Walter James Dale had one child, and Matilda Ann Wood had six children. By his will, after giving to his son and his daughter certain specific gifts, he gave the residue to trustees upon the usual trusts for sale, conversion and investment. He then directed his trustees

(1) [1929] W. N. 85.

(2) [1906] 1 Ch. 64, 66.

to pay the income to his wife for life and after her death to pay 1000*l*. to Emily Bridger his sister in law, and then to divide the residue into two equal parts, whereof one should be paid to his son Walter James Dale absolutely, and the other should be held in trust for his daughter Matilda Ann Wood for her separate use during her life, without power of anticipation, and after her death upon trust for all or such one or more of her children as she should appoint, and in default of appointment, upon trust for all or any of her children, who being sons, or a son, should attain the age of twenty-one years, or being daughters, or a daughter, should attain that age or marry under it, if more than one, in equal shares. From this it is plain that the testator, while treating his son and daughter on a footing of equality, provided that his daughter's share should be settled. He did this for obvious reasons having regard to the law then in force relating to married women and their property. The codicil does not affect the main provisions of the will. All it does is to deal with a dwelling-house the testator had purchased since the date of the will. He directs the rents to be paid to his wife for life, and after her death to his sister in law Emily Bridger for her life or until she should marry, and after her death or marriage the trustees are directed to sell the house and divide the proceeds thereof equally between the children of his son Walter James Dale and his daughter Matilda Ann Wood. Having regard to the dispositions of his residuary estate and the existing law, it is difficult to understand why the testator should—while making an absolute gift to the children of his son—make a similar gift to his daughter individually, and not to her children. In my view there is sufficient in the context afforded by the will and by the surrounding circumstances of this case to compel me to come to the conclusion that by the direction to divide " equally between the children of my son Walter James Dale and my daughter Matilda Ann Wood," the testator meant all his grandchildren by his son and by his daughter, and that he did not intend to exclude his grandchildren by his daughter or to benefit his said daughter to the exclusion of these grandchildren.

LUXMOORE J.
1930
DALE, *In re.* MAYER *v.* WOOD.

I consequently hold that on the true construction of the will and codicil the proceeds of sale of the house are divisible into sevenths, as stated in para. 1 (*a*) of the originating summons. The costs of all parties to be paid between solicitor and client out of the proceeds of sale.

Solicitors: *Lindo & Co.; C. G. Scott, Son & Pryce.*

A. R. T.

BENNETT J.
1930
Oct. 22, 23.

In re TRIMBLE.

WILSON *v.* TURTON.

[1930. T. 815.]

Will—Construction—Devise of Premises "free of all duties" to A. for life, with remainder over—Succession Duty payable on Death of Tenant for Life—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 18*—Finance Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 24.

A testator devised "free of all duties" certain premises to his trustees upon trust to permit S. to have the use and occupation of the same during her life, and after her death he directed his trustees to stand possessed thereof in trust for M. absolutely in fee simple. He also devised and bequeathed the residue of his real and personal estate to his trustees upon trust, after payment of his debts, funeral and testamentary and trust expenses and legacy, succession and other duties, to divide the same into thirty-four equal parts, and to stand possessed of one of such equal parts in trust for each of thirty-four residuary legatees named therein. A question arose whether the succession duty payable on the death of S. would be payable out of the residuary estate or out of the property so devised and by the person or persons entitled thereto upon her death:—

Held, that upon the true construction of the will the words "free of all duties" applied only to the succession duty presently payable on the death of the testator, and did not extend to the succession duty payable on the death of S.

ADJOURNED SUMMONS.

The testator by his will, dated April 19, 1928, bequeathed various pecuniary and specific legacies free of all duties. By clause 5 of his will he devised "free of all duties" Nos. 9 and 11, Union Street, and Nos. 14 and 16, Nelson Street, Leeds, unto the plaintiff, Isabel Cooling, a trustee of his will,

BENNETT J.
1930
TRIMBLE, *In re.*
WILSON *v.* TURTON.

upon trust to pay the net rents, income and profits to arise therefrom to his daughter, Alice Turton, during her life, and from and after her death he directed Isabel Cooling to stand possessed thereof in trust for such of his two grandchildren, the defendants Edward Purcell Turton and Margaret Cecilia Turton, as should survive Alice Turton absolutely in fee simple, and if more than one as tenants in common in equal shares. By clause 7 he devised "free of all duties" premises known as "Bourneville," 12 West Park Road, Leeds, unto his trustees upon trust to permit the defendant, Sarah Jane Catherine Priest, to have the use and occupation of the same during her life (she insuring and repairing the same and keeping down mortgage, principal and interest as therein mentioned), and after her death he directed his trustees to stand possessed thereof in trust for the defendant, Maud Priest, absolutely in fee simple. By clause 10 the testator devised and bequeathed the residue of his real and personal estate unto his trustees upon trust for sale and conversion as therein mentioned, and he directed his trustees to stand possessed of the proceeds of sale thereof and of his ready money, and, after payment thereout of his debts, funeral and testamentary and trust expenses and legacy, succession and other duties, and the expenses of proving and registering his will, to stand possessed of the residue upon trust to divide the same into thirty-four equal parts, and to stand possessed of one of such equal parts in trust for each of the thirty-four residuary legatees therein named. The defendants Alice Turton and Elsie Priest were two of the thirty-four residuary legatees. The testator died on March 15, 1929. The value of the property passing under clause 5 of the will was less than 15,000*l.*

This summons was taken out by the executors of the will of the testator and Isabel Cooling, and the principal question it raised was whether, having regard to the devises "free of all duties" contained in clauses 5 and 7 of the will and to the direction in clause 10 for payment out of the residuary estate of the testator of "legacy, succession and other death duties," any succession duty which might become payable in respect of each of the properties so devised upon the death of the tenant for life thereof would be payable out of the residuary estate or would be payable out of the property so devised and by the person or persons entitled thereto upon his or her death. A like question was raised in respect to estate duty.

Colquhoun Dill for the plaintiffs.

H. S. G. Buckmaster for defendants other than the residuary legatees. The duties from which the testator has freed the estate are not only those payable at his death, but those payable in the future: *In re Wedgwood.* (1) The words in *In re Parker* (2) were different, but there are sufficient indications here that the testator intended that the succession duty payable on the death of the tenant for life should be paid by the residuary estate. *Dunn's Trustees* v. *Dunn* (3) is a Scotch case in which it was held that the legacy duty payable on the death of the tenant for life was a charge against the testator's estate. The regulations as to payment of succession duty are similar to those in respect of payment of legacy duty—see s. 20 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51). *In re Sarson* (4) dealt with estate duty and *In re Laidlaw.* (5) For purposes of this kind succession duty must be regarded as the counterpart of legacy duty.

Evershed for the residuary legatees. The Court ought not to follow the decisions of Eve J. in *In re Sarson* (4) and *In re Laidlaw* (5) on a matter of principle. His decisions were based on a dictum in *In re Wedgwood* (1) on a point that did not arise in his cases. The difference between legacy duty and succession duty is that the legal personal representatives of a testator are primarily liable for legacy duty, while the persons who succeed to the property are primarily liable for succession duty. That, when dealing with real property, is a distinction of importance. The dicta in

(1) [1921] 1 Ch. 601.
(2) (1917) 117 L. T. 422.
(3) 1924 S. C. 613.
(4) [1925] Ch. 31.
(5) [1930] W. N. 206; since reported [1930] 2 Ch. 392.

BENNETT J.
1930
TRIMBLE, *In re.*
WILSON *v.* TURTON.

In re Wedgwood (1) do not necessarily govern these cases. In *In re Fenwick* (2) Sargant J. was dealing with the words "all duties of every description," and he held that they only applied to duties presently payable. Here there is no clear indication in the will as to payment of duty. The succession duty arises on the testator's death and is immediately payable. In *In re D'Oyly* (3) where Neville J. was dealing with estate duty he held that the words "free of duty" only applied to the duty presently payable. There is no sufficient indication here that the testator intended to free the devised property from the succession duty payable on the death of the tenant for life.

BENNETT J. The question of estate duty is covered by the decision in the Court of Appeal in *In re Wedgwood.* (1) The Court of Appeal decided in that case that the natural time for ascertaining the meaning of the words "free of all death duties" for the purpose of considering whether future estate duty had to be paid out of the estate of a testator, was when the legacies which are given free of duties are paid in the sense of having been transferred out and out from the testator's estate, and that the Court must find very clear words in a will before it can say that by such words the testator intended future estate duty to be paid. In this will I can find nothing whatever in the language of the testator himself which makes it clear that it was his intention that the future estate duty which will become payable in respect of the two properties in question, those devised by clauses 5 and 7 of his will, was to be paid out of his residuary estate, and therefore, so far as the estate duty is concerned my judgment, in answer to that part of Question 1, which raises the question of estate duty, is that the testator's residuary estate is not liable for that duty, that that duty will be payable out of the properties so devised by the person or persons entitled thereto upon the deaths of the respective tenants for life.

(1) [1921] 1 Ch. 601.
(2) [1922] 2 Ch. 775.
(3) [1917] 1 Ch. 556.

Succession duty seems to me to stand upon a different footing. I do not think there is any direct authority upon the question whether such words as are in this will extend to the payment of future succession duty. The decision. I think, must ultimately depend upon the proper construction of the phrases which are to be found in the will upon which the question arises. In this will the question only arises in respect of the devise contained in clause 7, because it appears from the evidence that having regard to the relationship of the devisees to the testator and the value of his estate no succession duty is payable in respect of the devise contained in clause 5. The devise contained in clause 7 is therefore the only devise which it is material to consider. The first important words are those contained in the clause itself, namely—" I devise free of all duties the hereditaments known as 'Bournville,' 12 West Park Road, Roundhay, Leeds . . . unto my trustees upon trust." The second important words are those contained in clause 10, a clause which contains the residuary gift. Now I do not think that the decisions relating to the legacy duty payable upon a settled legacy govern a case which is concerned with succession duty, because, as Mr. Evershed has pointed out, legacy duty in a case of a settled legacy is payable by the executors of a will whether the legacy duty is payable upon the death of the testator or whether, because of the difference between the rates of duty payable by a tenant for life and those entitled in remainder, payment is deferred to a later occasion; and because the amount of the duty in the case of a legacy of personal property is ascertainable upon the death of the testator, whereas in the case of a succession to real property the amount of the duty payable by persons enjoying the settled property in succession cannot be determined until a successor becomes entitled in possession to his interest. This seems to me to be the effect of s. 24 of the Finance Act, 1925, and s. 18 of the Finance Act, 1894. Looking at the language of this will, and first of all at the language of clause 7, where the testator devises " free of all duties the hereditaments known as 'Bournville,'" I think I ought to keep in mind and to be

BENNETT J.

1930

TRIMBLE, *In re.* WILSON *v.* TURTON.

guided by the opinion of Sargant J. in *In re Fenwick* (1) that prima facie "the words 'free of all duties' when used with regard to a fund, and not expressed to be with regard to successive interests in the fund, or with regard to the interests of beneficiaries in the fund, would be satisfied by applying them to the duties which would be paid at the time when the fund was handed over, and need not be extended so as to include the duties which will be payable on a subsequent devolution; because it is the fund that is being dealt with and considered." It seems to me that those words apply to real estate specifically devised. Now is there anything in the terms of the residuary devise which extends the prima facie meaning of those words "free of all duties"? The argument on behalf of the remaindermen under the devise rests upon the use of the plural in the direction in the residuary gift that the testator's executors are to pay out of the proceeds of sale and conversion of his property "the legacy, succession and other duties." The use of the plural is necessitated, as it seems to me, by the reference to the legacy duty as well as to succession duty, and it does not seem to me that the use of the term "duties" indicates that the testator intended to direct the payment out of his residue of a future succession duty. I have referred, I think, to all the words in the will which bear upon the question, and with regard to the future succession duty, it being possible to satisfy the words "free of all duties" by discharging the duties payable upon the testator's death and there being no words which make it clear that this testator intended any future duties to be paid out of residue, upon the construction of this will, in my judgment that duty is not payable out of the residuary estate. The question, therefore, with regard to the succession duty payable in the future must be answered in the same way as the question relating to the future estate duty.

Solicitors for all parties: *Wynne-Baxter & Keeble, for Bromley & Walker, Leeds.*

P. J. B.

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(1) [1922] 2 Ch. 775, 779.

In re JONES.

JONES *v.* CUSACK-SMITH.

[1906. J. 1149.]

BENNETT J.

1930
Dec. 3.

Law of Property—Trust for Sale—Other statutory Trusts and Powers—Trustees for Sale—Duty to consult Beneficiaries—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 26, *sub-s.* 3—*Law of Property* (*Amendment*) *Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*

A summons in an administration action was taken out by the trustees for the purposes of the Settled Land Act, 1925, of a settlement of real estate made by the will of a testator for the determination of the question whether the provisions of s. 26, sub-s. 3, of the Law of Property Act, 1925, as amended by the Law of Property Act, 1926 (by which they were directed to consult the wishes of beneficiaries), applied only in respect of sales or applied also to the exercise by them of their other statutory trusts and powers:—

Held, that it was the duty of the trustees to consult the wishes of the beneficiaries not only with regard to the exercise of the trust for sale, but also with regard to the exercise of all other trusts and powers arising under the Settled Land Act, 1925, and the Law of Property Acts, 1925 and 1926, and the additional or larger powers conferred by the settlement on the trustees thereof or otherwise.

SUMMONS.

The trustees for the purposes of the Settled Land Act, 1925, of a settlement of real estate made under the will, dated February 5, 1881, of a testator obtained on April 3, 1930, an order (in administration proceedings which were commenced in 1906) declaring that, in the events which had happened, they were entitled to exercise all the statutory trusts and powers conferred upon trustees for sale by the Settled Land Act, 1925, the Law of Property Act, 1925, and the Law of Property (Amendment) Act, 1926.

The trustees took out a summons in the action for the determination of the question (inter alia) whether the provisions of s. 26, sub-s. 3, of the Law of Property Act, as amended by the Act of 1926, applied only in respect of sales by the trustees for the purposes of the Settled Land Act, in exercise of the statutory trusts, or applied also in respect of all or any and if so what other acts and dealings by the trustees in relation to the settled estates or the moneys or investments representing the same in exercise of the statutory trusts and powers conferred upon trustees for sale by the above mentioned statutes and the additional or larger powers conferred by the settlement on the trustees thereof or otherwise.

C. J. Parton for the applicants.

C. Montgomery White for the tenant for life. The sub-section is limited to cases involving the exercise of the trust for sale. (1) In a matter of this sort convenience and expense must be considered. It is useless to consult a number of beneficiaries without putting the relevant facts before them. It is also not practicable to consult a number of persons, as delay will be caused by doing so.

L. W. Byrne for various beneficiaries. Sub-ss. 1 and 2 are not limited to cases involving the exercise of a trust for sale. Consequently, as there are no words in sub-s. 3 limiting it in that respect, it must be read in the same way, in order

(1) Law of Property Act, 1925, s. 26:—

(1.) "If the consent of more than two persons is by the disposition made requisite to the execution of a trust for sale of land, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or to the exercise of any statutory or other powers vested in the trustees for sale shall be deemed sufficient."

(2.) "Where the person whose consent to the execution of any such trust or power is expressed to be required in a disposition is not sui juris or becomes subject to disability, his consent shall not, in favour of a purchaser, be deemed to be requisite to the execution of the trust or the exercise of the power; but the trustees shall, in any such case, obtain the separate consent of the parent or testamentary or other guardian of an infant or of the committee or receiver (if any) of a lunatic or defective."

(3.) [As amended by the Law of Property (Amendment) Act, 1926]: "Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with."

"In the case of a trust for sale, not being a trust for sale created by or in pursuance of the powers conferred by this or any other Act, this sub-section shall not apply unless the contrary intention appears in the disposition creating the trust."

that the whole section may be consistent. The wishes of all the beneficiaries ought therefore to be consulted: see *In re House.* (1)

BENNETT J. The question for the determination of the Court is what are the duties of trustees for the purposes of the Settled Land Act, 1925, under s. 26, sub-s. 3, of the Law of Property Act, 1925, as amended by the Law of Property (Amendment) Act, 1926. Must trustees for sale consult the persons of full age for the time being entitled in possession to the rents and profits of the land on the occasion of the exercise of any of their statutory trusts and powers, or is their duty limited to consulting the beneficiaries when they propose to exercise the trust for sale ?

The question turns entirely on the proper construction of s. 26 of the Act of 1925 as amended by the Law of Property (Amendment) Act, 1926. The material section reads as follows: [His Lordship read sub-s. 1 and continued:] It is clear, I think, from that sub-section that, where the consent of more than two persons is required to the exercise of " any statutory or other powers," the sub-section is not dealing merely with the exercise of a trust for sale but with the exercise of any other trust or power. [After reading sub-s. 2 his Lordship continued:] Again, in that sub-section, what is being considered is not merely a trust for sale, but the exercise of any trust or power.

Sub-s. 3, as amended, is as follows: " Trustees for sale shall so far as practicable consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this sub-section have been complied with."

The question is whether the operation of that sub-section is to be limited to cases in which the trustees for sale intend

(1) [1929] 2 Ch. 166, 172.

BENNETT J.
1930
JONES, *In re.*
JONES *v.* CUSACK-SMITH.

to exercise the trust for sale. It appears that so to limit it would necessarily lead to an inconsistency between that sub-section and what seems to be the clear intention of the two earlier sub-sections. It seems that, there being nothing expressed to limit sub-s. 3 or to indicate that sub-s. 3 is to have a different meaning from sub-ss. 1 and 2, I ought to adopt an interpretation which would make the whole section hang together, and the result is that the answer to the question is that the trustees must consult the beneficiaries, not only in the exercise of the trust for sale, but also in the exercise of all other trusts and powers arising under the Settled Land Act, 1925, and the Law of Property Acts, and the additional or larger powers conferred by the settlement upon the trustees or otherwise.

Solicitors: *Boxall & Boxall; Indermaur & Brown, for Edwin Boxall & Kempe, Brighton; Gregory, Rowcliffe & Co.*

J .L .D.

SIMONS *v.* ASSOCIATED FURNISHERS, LIMITED.

[1930. S. 1157.]

CLAUSON J.

1930

Dec. 1, 2.

Lease—Construction—Power to determine if, "up to Determination" of Lease, Lessees perform the Covenants—Condition Precedent—Notice to determine—Breach at Date of Notice not remedied until Expiration of Notice—Validity of Notice.

By a lease dated December 31, 1925, the plaintiff demised certain buildings to the defendants for a term of years at a yearly rent. The lease contained covenants by the defendants that they would at all times during the term keep and at the expiration or sooner determination of the lease yield up the demised promises in substantial repair. The lease contained a proviso that if the defendants should desire to determine the lease at the expiration of the first five or ten years of the lease and should give to the lessor six calendar months notice in writing of such desire, and should, up to the time of such determination, perform and observe the covenants on their part, then immediately on the expiration of such five or ten years, as the case might be, the demise and everything therein contained should cease and be void, but without prejudice to the remedies of either party against the other in respect of an antecedent breach of covenant.

On August 17, 1929, the defendants served the plaintiff with a notice in writing to determine the lease on February 28, 1930. The plaintiff, having refused to recognize the validity of the notice on the ground that at the date thereof breaches of the repairing covenants remained unremedied by the defendants, brought this action claiming a declaration that the lease was still subsisting and binding on the defendants :—

Held, that the condition to perform the covenants in the lease upon which the defendants were empowered to determine the lease was a condition precedent.

Grey v. *Friar* (1854) 4 H. L. C. 565 applied.

Held, also, that, as the breaches, although they were unremedied at the date of the notice, had been remedied by the time the notice expired, the condition was fulfilled, with the result that the lease had been effectually determined.

WITNESS ACTION.

By a lease dated December 31, 1925, the plaintiff demised certain buildings at Merthyr Tydfil to the defendants for a term of rather more than seventeen years from March 1, 1925, at a yearly rent. The lease contained covenants by the defendants to well and substantially repair and at all times during the term of the lease keep in repair the demised premises and at the expiration or sooner determination of the lease to yield them up in substantial repair, and in particular to paint certain exterior parts of the premises in every third year. The lease also contained the following proviso: "If the company"—the defendants—"shall desire to determine the present demise at the expiration of the first five or ten years of the said term and shall give to the lessor six calendar months previous notice in writing of such their desire and shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained then immediately on the expiration of such five or ten years as the case may be the present demise and everything therein contained shall cease and be void, but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant."

On August 17, 1929, the defendants gave the plaintiff notice in writing to determine the lease on February 28, 1930.

The plaintiff having refused to recognise the validity of the notice on the ground that at the date of the notice there were subsisting breaches of the repairing covenants in the lease which at the date of the expiration of the notice remained unremedied, brought this action claiming a declaration that, notwithstanding the notice by the defendants to determine the lease, the lease was still in force and binding on the defendants. The plaintiff, who admitted service of the notice upon him, alleged by his statement of claim that, in addition to other breaches of covenant, the defendants in breach of their covenants to repair had allowed the premises to fall into a serious state of dilapidation and neglected to paint the exterior parts of the buildings in the third year of the term. He further alleged that on August 21, 1929, a schedule of dilapidations was duly served on the defendants, who were required to carry out the repairs therein specified, and that the defendants in breach of their covenant in that behalf failed to comply with the plaintiff's requirements. The plaintiff therefore charged the defendants with breaches of their repairing covenants in the lease (particulars of which were specified in the schedule of dilapidations), which, as he alleged, both at the date of the notice of August 17 and at the date of its expiration, continued unremedied. And he claimed that the power to determine the lease was conditional upon the defendants' performance of the covenants on their part and that by reason of those breaches the defendants lost their right to determine the lease and that consequently their notice was invalid. The defendants by their defence admitted that at the date of their notice to determine the lease there were certain repairs which required to be effected under their covenants, but alleged that all repairs and painting required by their covenants had been duly carried out and completed before the expiration of the notice, as the plaintiff, after his inspection of the buildings, admitted by a letter of February 25, 1930, and that, all the covenants on their part having been duly performed, they on February 28, 1930, tendered the key and yielded up possession of the buildings to the plaintiff.

Clauson J. having held, on the evidence given at the trial as to the condition of the buildings on February 28, 1930, the date when the notice of August 17, 1929, expired, that at that date the buildings had been put into such a state of repair as to satisfy the defendants' covenants in the lease, the question remained to be determined whether, notwithstanding that finding of the Court, the fact that at the date of the notice there existed breaches of covenants by the defendants which at that date continued unremedied was sufficient to invalidate the notice.

W. P. Spens K.C. and *H. S. G. Buckmaster* for the plaintiff. Upon the proper construction of the proviso in the lease, the crucial date is the date when the notice to determine the lease was served upon the plaintiff. The condition as to the performance of the covenants is a condition precedent to the exercise of the power to determine the lease. It is not a condition which was capable of performance at any time after the date of the notice : *Stait* v. *Fenner*. (1) The qualifying words "without prejudice to the remedies," etc., have not the effect of modifying the previous condition: *Grey* v. *Friar* (1); and *Burch* v. *Farrows Bank, Ld.* (2), where Neville J. held that similar qualifying words were not sufficient to modify the meaning of the words creating the condition and gave his opinion that *Grey* v. *Friar* (1) was a clear decision to the same effect. As to the main question, namely, whether the condition was unfulfilled owing to the admitted breaches which at the date of the notice had not been made good: In *Grey* v. *Friar* (1) and all the other reported cases on the matter there was a breach which remained unremedied at the expiration of the notice to determine the lease. There is no reported authority covering the facts of this case, where there were breaches which had not been remedied at the date of the notice but had been made good by the time the notice expired. In no reported case has it been decided that the date of the notice is the crucial date. The stronger plea in *Grey* v. *Friar* (1) that breaches remained unremedied at the expiration of the notice did not necessarily exclude the plea of the existence of breaches at the date of the notice then unremedied. In cases relating to the exercise of a power to renew a lease judicial dicta are to be found that the date of the notice may be the material date to be considered. In *Finch* v. *Underwood* (3) James L.J. said (4): "The lessee who comes to claim the new lease must show that at that time the property is in such a state as the covenants require it to be"; and Mellish L.J. (5) thought that the condition was satisfied if the covenants had been so observed and performed that there was no existing right of action under them at the time when the new lease was applied for. In *Bastin* v. *Bidwell* (6) it was not necessary for Kay J. to decide the point because, as in the other reported cases, at both dates there existed breaches of the covenants. But there are strong indications throughout his judgment that the date of the notice is the material date; and referring to *Finch* v.

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(1) [1912] 2 Ch. 504, 513, 514.

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(1) 4 H. L. C. 565.
(2) [1917] 1 Ch. 606.
(3) (1876) 2 Ch. D. 310.
(4) (1876) 2 Ch. D. 315.
(5) Ibid. 316.
(6) (1881) 18 Ch. D. 238.

Underwood (1) Kay J. said (2) that the words in that case being "the covenants having been performed," seemed to point to the time when the notice was given. Upon a reasonable construction of the proviso where the condition is that the covenants must be performed "up to" and not "at" the expiration of the notice, the rights of the parties crystallized when the defendants exercised their right, that is, at the date of giving the notice.

Vaisey K.C. and *Wilfrid Hunt* for the defendants. It is conceded that the condition in the proviso is a condition precedent. All three conditions have been complied with —namely, the desire to determine the lease, the service of the notice and the performance and observance of the covenants up to the time of the expiration of the notice. The phrase in *Stait* v. *Fenner* (3) "up to the determination of the lease" is in effect the same as in the present case, where the defendants have proved that up to that point of time the covenants have been performed. The condition in *Burch* v. *Farrows Bank, Ld.* (4) also contained the same phrase "up to such determination," and Neville J. in that case held that, as the covenants were not performed until several days after the date when, if the notice were good, the lease would have been determined, the notice was bad and the lease was not determined. Although in the result the notice in that case was bad, it was not bad ab initio. In *Finch* v. *Underwood* (1) there were subsisting breaches of covenant to repair both at the date of the lessee's notice of application for renewal and also when that notice expired. That case related to the renewal of a lease where it was held that as the condition was not fulfilled when the new lease was "applied for"—a somewhat ambiguous expression—the lessee was not entitled to a new lease. In *Bastin* v. *Bidwell* (5) Kay J. said he purposely avoided declaring which of two constructions should be preferred, that was, whether the clause meant that there should be no breach at the time the notice was given or that there should be no breach at the time when the notice expired, because in that it was immaterial so to decide. The weight of judicial opinion in *Grey* v. *Friar* (1) favours the construction we ask the Court to adopt. Here, when the notice expired there existed no cause of action in respect of the performance of the covenants: see the judgment of Erle J. (2)

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(1) 2 Ch. D. 310.

(2) 18 Ch. D. 238, 251, 252.

(3) [1912] 2 Ch. 504, 513, 514.

(4) [1917] 1 Ch. 606.

(5) 18 Ch. D. 238.

CLAUSON J. By a lease of December 31, 1925, the plaintiff, in consideration of the rent and covenants mentioned therein, demised certain buildings for a term of about seventeen and a-half years, from March 1, 1925, to the defendants. That lease contained the usual repairing covenants, including, among others, the usual covenant to do certain outside painting in the third year of the term and in every subsequent third year. It also contained this clause: [His Lordship then read the proviso in the lease set out above and continued:] That clause is in an exceedingly familiar form. Such a form—or one so closely resembling it as to be practically indistinguishable—has been in common use for more than a century past. It has been before the Court many times, and it would be dangerous to depart a hair's breadth from decisions upon it in former cases.

The further facts which I must state are these. During the five years from time to time the tenants failed to observe or perform various covenants, in particular, they failed to perform the covenant to do outside painting in the third year; with the result that there was, without doubt, a breach of covenant. On August 17, 1929, they served a notice on the plaintiff, pursuant to the clause which I have read, of their intention to determine the lease on February 28, 1930; that was at the end of the fifth year of the term. There is no doubt that at the date when that notice was served, not only was it true to say that between the commencement of the term and that date covenants had been broken, but it was also true to say that at the moment the notice was given there were existing causes of action in respect of breaches of covenant; in other words, there were breaches unremedied. Between

(1) 4 H. L. C. 565.

(2) 4 H. L. C. 599.

the date when the notice was given and the end of the fifth year, as I have already found, all breaches of covenant had been remedied and there did not exist at that date any cause of action in respect of arrears of rent or breaches of covenant.

The point which emerges for decision is this: Does the fact that at the moment the notice was given there were unremedied breaches of covenant available to the plaintiff as causes of action prevent the notice being effective to determine the term, in spite of the fact that before the end of the fifth year all those breaches had been remedied? The question must turn upon the true meaning of this clause. I am bound by the highest authority to hold that the words "if the Company shall up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained," express what is in technical language known as a condition precedent. That condition has got to be fulfilled, if the tenants are to have the right which this clause gives them to claim a determination of the term. Taking the words as they stand, there could be little doubt the clause is a condition precedent. The difficulty arises from the fact that after the provision in the clause that in events stated the demise shall cease, there are added these words: "but without prejudice to the remedies of either party against the other in respect of any antecedent claim or breach of covenant," words which suggest that it may be that the clause ought not properly to be construed as a condition precedent and as essential to be observed before the right to determine the lease can be exercised. I need not go into the point, which was one that occasioned great difficulty some seventy-six years ago, because it was decided in the case of *Grey* v. *Friar* (1) that notwithstanding the addition of the words which I have read, the clause must be considered as a condition precedent.

From that it follows that, whatever its proper meaning, it is essential for the defendants first to show that the condition has been fulfilled, before they can establish their right to have

(1) 4 H. L. C. 565.

the lease treated as having been determined by the notice they served on the plaintiff.

The next question is, what does the clause mean? Upon a possible construction, it may make it essential that the tenant should comply with all the covenants throughout the whole period of the five years or, in other words, that the tenant must be able to say that in no single instance during that period has rent been in arrear or a covenant broken.

On that question there has been from time to time a certain amount of difference of judicial opinion. If the condition imports that it is unfulfilled if there has been any breach of covenant, even if it has been remedied, the condition may be a very hard one and such as can scarcely be supposed that parties would enter into; but here I am bound by a very heavy weight of judicial opinion to hold that the true meaning of that clause is this, that it will have been complied with, if at the end of the five years "there should not exist any cause of action in respect of performance of covenants": or, I may put it this way, the condition must be understood as "requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if broken, must have been satisfied." In the language I have used I have ventured to quote the language in the first case of Erle J. (1) and in the second case the language of Coleridge J. (2) in advising the House of Lords in the case to which I have already referred.

Mr. Spens, who argued the case for the plaintiff, as I understand admits that the view which I am stating now in the words of those learned judges is the correct view of the construction of the clause in that case, in which the existence of unremedied breaches at the expiration of the notice made it unnecessary to consider any question of breaches at the date of the notice. Whether or not he admits it, in my opinion it is the right construction of the clause before me. That being the meaning of the clause, let me turn again to it and see what all the

(1) 4 H. L. C. 599.

(2) 4 H. L. C. 608.

conditions are that have to be fulfilled. The first condition is: "If the company shall desire to determine the present demise at the expiration of the first five years." There is no doubt about that. The second condition is: "If they shall give the lessor six calendar months' previous notice in writing of such their desire." There is no doubt they have done that. The third condition is that they shall "up to the time of such determination pay the rent and perform and observe the covenants and conditions on their part hereinbefore contained." There is no doubt, if this construction of the clause which I have already adopted is correct, they have done that. Accordingly in my view all the conditions have been fulfilled and the term effectually determined.

The answer put forward on behalf of the plaintiff is that at the moment the notice was given there were unremedied breaches in existence; and, that being so, the notice was bad. Speaking for myself I am unable to find in this clause anything which makes it a condition that the rent must have been paid and the covenants performed and observed at the date when the notice was given. I find nothing to make that a crucial date. Of course, if I had to construe the condition as providing that throughout the five years there must be no instance of an unremedied breach of covenant, then it seems to follow that the existence of an unremedied breach of covenant at the particular moment the notice was given would have been, just as the unremedied breach of covenant at any other moment of the five years would have been, an answer to the defendants' claim, because the condition would not have been fulfilled. But assuming that the construction which I place upon this clause is correct, I can find nothing on the construction of the clause to suggest the requirement that the condition must have been complied with at the moment the notice is given.

The whole difficulty has arisen in this way. There are undoubtedly certain cases in which the question before the Court was whether or not a tenant under similar or analogous circumstances was entitled to rely upon a clause such as this, where there had been unremedied breaches at the date at which the period in question, corresponding to the five years' period in the present case, came to an end, and judges have used, there is no doubt, language suggesting that it is material to look and see what the condition of things was at the date of the notice, though, as it happens, in none of the cases did it matter, because the state of things at the expiration of the period and the state of things at the date of the notice were in every such case the same and no such difficulty as I am faced with in the present case arose; but it is true that in some of those cases judges have used language which may be construed as suggesting that the state of matters with regard to breach of covenant at the date of the notice may have to be considered. I do not propose to travel through those cases, because it is admitted that none of them decide anything which is binding upon me.

My duty is to construe this clause, and construing the clause I can find no difficulty in the matter at all, and accordingly, whatever may be the explanation of the language used in the cases I have referred to, I find myself unable to hold that the fact that at the moment the notice was given there were unremedied breaches of contract has any bearing on the matter I have to decide. I am therefore of opinion that the defendants complied with all the conditions that were necessary to enable them to treat the term as determined, and accordingly the action, which claims a declaration that the lease is still subsisting, must necessarily fail. There is no counterclaim for a declaration that the lease has been determined, and I think the most convenient course will be simply to dismiss the action with costs.

Solicitors: *Ernest A. S. Howell; Sharpe, Pritchard & Co., for Harrison & Sons, Leeds.*

H. C. H.

In re COCKELL.

JACKSON *v.* ATTORNEY-GENERAL.

[1930. C. 372.]

C. A.
1930
CLAUSON J.
May 30; *June* 17.
C. A.
Nov. 17; *Dec.* 9.

Administration—Insolvent Estate—Debt Due to Executor—Retainer by Executor—Crown Debt—Priority—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *ss.* 34, 57, *Sch. I., Part I.—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*).

Since the Administration of Estates Act, 1925, an executor in administering an insolvent estate has upon the proper construction of ss. 34 and 57 and Part I. of Sch. I. of the Act, a right to retain out of the assets of the deceased a debt owing to him in his own right in priority to the Crown's preferential claim under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914 (which is made applicable to an insolvent estate by s. 34, sub-s. 1, and r. 2 of Part I. of Sch. I. of the Act of 1925) for arrears of income tax due from the deceased.

So held by the Court of Appeal (Lord Hanworth M.R. and Lawrence L.J.; Romer L.J. dissenting), affirming the decision of Clauson J.

ADJOURNED SUMMONS.

Norman A. Lindsey Cockell, by his will dated June 5, 1919, appointed the plaintiff Emily Elizabeth Jackson his executrix, and devised and bequeathed to her the whole of his estate and effects.

The testator died on June 19, 1929, and the plaintiff proved his will. The value of the estate was little more than 1000*l.*, and the debts amounted to more than 3000*l.* It was plain therefore that the estate, which was being administered by the plaintiff out of Court, was insolvent. Amongst the creditors were the plaintiff herself for sums of 400*l.* and 600*l.* with some interest upon those sums, which she claimed to have lent to the testator, and the Crown, who claimed to be a preferential creditor in accordance with the terms of s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, in respect of arrears of income tax and super tax for which the testator had been assessed before his death. It appeared that the plaintiff's claim, together with the necessary costs, amounted to such a figure that, if the plaintiff had the right to retain the amount which she claimed in priority to the Crown's preferential debt, there would be no assets left to meet that debt.

An originating summons accordingly was taken out to determine the question which had arisen, whether the plaintiff might exercise her right of retainer against the Crown and in priority to the Crown's preferential claim for income tax and super tax under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914 (1), and s. 34 of the Administration of Estates Act, 1925 (2), and Part I. of the First Schedule to that Act. (3)

Fergus Morton K.C. and *Norman Daynes* for the plaintiff. The plaintiff, as executrix, has a right to retain against the claim of the Crown to priority. The estate being insolvent,

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(1) Bankruptcy Act, 1914, s. 33, sub-s. 1: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts:—

"(*a*) . . . . income tax, assessed on the bankrupt up to the fifth day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment."

Sub-s. 5: "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

(2) Administration of Estates Act, 1925, s. 34, sub-s. 1: "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act."

Sub-s. 2: "The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors."

Sub-s. 3: "Where the estate of a deceased person is solvent his real and personal estate shall . . . . be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

(3) First Schedule, Part I.: "Rules as to Payment of Debts where the Estate is insolvent. (1.) The funeral, testamentary, and administration expenses have priority. (2.) Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

s. 34 of the Administration of Estates Act, 1925, has to be applied. Sub-s. 2 applies to insolvent as well as to solvent estates, and confers a right of retainer (which is only of value in cases where the estate is insolvent) in respect of "all" assets, and by s. 57 (1) the provisions of the Act, including s. 34, are made binding on the Crown. The effect of s. 34 is to deprive the Crown of its right to the priority which it possessed before the Act and to place it in no better position than the subject.

The Act of 1925 alters the law in so far as the rules of bankruptcy are to be applied in the administration of a deceased person's insolvent estate, whether the administration be out of Court or under the Court. The application of the rules in bankruptcy is not restricted to cases of administration by the Court, as was the case under s. 10 of the Judicature Act, 1875. By sub-s. 2 of s. 34 the right of retainer is extended in respect of all assets, not only of equitable as well as legal assets, but of all the assets, including so much of the assets as before the Act would have been available in the first place for creditors including the Crown, whose claims were in respect of debts which ranked above the debt of the executor in respect of which he claimed a right to retain. The effect of ss. 34 and 57 is to cut down the Crown's general right to preference which it possessed before the Act and to leave it with the limited preference contained in s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, conferred by sub-s. 1 of s. 34 and Part I. of the First Schedule of the Act of 1925. The words in the paragraph immediately before sub-s. 3, "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors," mean subject to the provisions of sub-s. 2, which deal with the scope of the executor's right of retainer. In *In re Laycock* (2) the Court was concerned with the effect of s. 10 of the Judicature Act, 1875, and s. 33 of the Bankruptcy

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(1) Administration of Estates Act, 1925, s. 57: "The provisions of this Act bind the Crown . . . . as respects the estates of persons dying after the commencement of this Act. . . . ."

(2) [1919] 1 Ch. 241.

Act, 1914, and it was held that the Crown's right to preference at common law was not affected when the deceased's estate was being administered out of Court: the decision turned upon s. 10 of the Judicature Act, 1875, which has been repealed by s. 56 of the Act of 1925.

[*In re Gilbert* (1) and *In re Rhoades* (2) were also referred to.]

J. H. Stamp (*Sir William Jowitt A.-G.* with him) for the defendant, the Attorney-General. Before the Judicature Act, 1875, an executor might retain out of the legal assets his debt as against all other creditors of equal rank; and since Hinde Palmer's Act of 1869, against specialty creditors. He may assert his right at any time until the distribution of the estate: *In re Rhoades.* (2)

The Judicature Act left that position intact, and only altered the rules for administering an estate when the estate was insolvent. Without any judgment obtained in its favour the Crown had priority, although it is true the Crown must obtain judgment if it required to enforce its claim. The general preferential position of the Crown has not been altered by the Act of 1925, nor has it been altered in respect of its particular preferential right which it claims to payment of these arrears of income tax. The estate being insolvent, sub-s. 1 of s. 34 applies, and the bankruptcy rules laid down by s. 33 of the Bankruptcy Act, 1914, are made to apply: but those rules are not consistent with the continuance of the executor's right of retainer or of giving preference. The moment the estate has been ascertained to be insolvent, whether it is being administered out of or under the Court, the right of retainer disappears. Sub-ss. 1 and 2 cannot be combined so as to be construed together. When the estate is found to be insolvent, sub-s. 2 is overruled by the provisions of sub-s. 1, which apply the rules in bankruptcy. The primary object which sub-s. 2 has in view is the extension of the right of retainer out of equitable in addition to legal assets. The right of the Crown to preference is not taken away by the mere use of the words " all assets of the deceased " in sub-s. 2. Those assets must be construed as being the assets which are

(1) [1898] 1 Q. B. 282.
(2) [1899] 2 Q. B. 347.

available to satisfy the executor's right of retainer after the claim of the Crown has been satisfied. The words "Subject as aforesaid, nothing in this Act, etc., etc.," govern all that goes before, and must be construed to govern the preceding sub-s. 1 as well as sub-s. 2; that is to say, the right of retainer referred to in the paragraph above quoted is made expressly subject to the rules of administration made applicable to an insolvent estate by sub-s. 1, which rule out the right of retainer. There is nothing in the Act to deprive the Crown of its right to preference which it has under the common law. The right of retainer conferred by the Act can only be in respect of assets remaining after the Crown's preferential claim has been satisfied. Sect. 57 cannot be called in aid to deprive the Crown of that right. Subject to sub-ss. 1 and 2 nothing in the Act of 1925 is to affect the right of retainer; that is sufficient to exclude the operation of s. 57.

CLAUSON J. The testator in this case died on June 19, 1929, having appointed the plaintiff, Mrs. Jackson, his sole executrix, and his universal legatee and devisee. She has since taken out probate. The position of the estate is this, that it consists at the present moment of a sum of about 920*l.* cash and 100 shares of the value of about 100*l.* I assume that that means after payment of the whole of the funeral expenses, which is a small matter, with which I need not for the moment trouble. There are debts which are far larger than the amount of the estate available to pay them. The plaintiff, the executrix, has a claim for two sums of 400*l.* and 600*l.*, that is, 1000*l.*, with, I gather, some interest upon that as well; at all events a claim for about 1000*l.* As respondent to this summons I have the Attorney-General, the reason for his presence being that the Crown has a claim to be a preferential creditor in accordance with the terms of the Bankruptcy Act for a sum in respect of income tax and super tax. There may be a question as to the exact amount in respect of which that preference can be claimed, but the first question which has to be determined is this: Has the plaintiff in respect of her claim for 1000*l.* the right to retain

C. A.
1930
COCKELL,
In re.
JACKSON
v.
ATTORNEY-GENERAL.
Clauson J.

that out of the assets in priority to any payment to the Crown in respect of the preferential debt that I have mentioned ? It would seem fairly clear that the plaintiff's claim, together with the necessary costs, will amount to such a figure that, if the plaintiff has the right to retain in priority to the Crown's preferential debt, there will be nothing left for the Crown's preferential debt.

In order to ascertain whether or not the plaintiff has that right of retainer I have to turn to the Administration of Estates Act, 1925, which repealed a number of Acts which dealt with administration of estates, and has enacted something of the nature of a code in regard to the administration of estates. The representative of the Crown being respondent to the summons, I turn first to s. 57 of the Act in order to ascertain whether the Crown is by this statute left in the advantageous position in which the Crown was at common law in regard to various claims against the estates of deceased persons, and I find this : " The provisions of this Act bind the Crown . . . . as respects the estates of persons dying after the commencement of this Act, but not so as to affect " certain provisions relating to limitation of actions, with which I have nothing to do. I understand that to mean that where in the Act I find a general reference to creditors, I am to construe that as including the Crown, and where I find rules of administration laid down in general terms I am to treat those rules as rules which bind the Crown in just the same way as they would bind any subject.

I now have to turn to s. 34 of the Act, and I find under sub-s. 1 this provision : " Where the estate of a deceased person is insolvent "—and this is admitted in this case—" his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act." Part I. of the First Schedule is in these terms : [His Lordship read Part I. and continued :] The first point to be observed is that, if the estate is insolvent those are the rules which are to be applied, whether the proceeding for the administration of the assets of the deceased is in Court or not. That seems clear ; and I only mention that in order to show why, if that be the true view of the Act, it is unnecessary to deal in any way with the decision in *In re Laycock* (1), because assuming that case to be rightly decided, as I am bound to assume, the question in that case, which was whether the rules which the Judicature Act laid down as rules of administration in the case of an insolvent estate applied only where there was an administration proceeding in the Court, is now of no importance.

The next point is this: so far as this schedule is concerned, it is clear, reading into it the provisions of the law of bankruptcy, that subject to the payment of funeral, testamentary and administration expenses, the Crown will come first in priority of payment in respect of these claims which it has for a certain amount of income tax and super tax; and as to that there is no dispute. So far the matter is clear. The executrix can, so far, have no claim whatever to come in in front of the Crown.

But I have to deal with the next sub-section, which runs thus: "The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person." Then in a separate paragraph come the following words: "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors." Then the third sub-section is in these terms: "Where the estate of a deceased person is solvent his real and personal estate shall . . . . be applicable" according to rules which I do not pause to state here.

The first observation to be made on sub-s. 2 is that it is clear from the context that that rule applies to the case where the estate of a deceased person is insolvent. I cannot conceive that that sub-section would find itself in its present position—namely, immediately after a statement of the rules dealing with an insolvent estate and immediately before a statement of the rules dealing with a solvent estate—unless

(1) [1919] 1 Ch. 241.

the sub-section were intended to apply to the case of an insolvent estate; and I have approached the consideration of the section with that in mind.

Next it is to be observed that the right of retainer—and it is with the right of retainer only that I have to deal in this particular case—may in accordance with the sub-section be exercised in respect of all the assets of the deceased. It is perfectly true that that has the effect, from the time of the passing of this Act and in cases to which it applies, of extending the right of retainer from a right to retain in respect of legal assets to a right to retain in respect of equitable assets. It has no doubt that effect. It has further, as it seems to me, this effect, that in respect of this right of retainer, all assets of the deceased are placed on the same footing; and that is material for this reason, that apart from this Act, or certain preceding legislation with the details of which I will not trouble, the right of retainer of an executor did not apply to all assets of the deceased, not even to all legal assets, but only to such legal assets as were available after provision had been made to meet liabilities due to creditors of a superior degree to that in which the executor, in respect of the debt which he claimed to retain, ranked. It appears to me, on the plain meaning of the language, that when the Legislature enacts that the right of retainer may be exercised in respect of all assets of the deceased, the Legislature with reasonable plainness lays it down that there shall be no such distinction as that which at some time prevailed in regard to creditors of varying degrees. Then there are words which to some extent diminish the right of retainer: "but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person." Those words I am not concerned with in this particular case, because the claim in respect of which the executrix claims to retain is a claim for a debt owing to her in her own right. The section then continues: "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors." I understand that to mean this:

Notwithstanding any inference which you might have drawn from other sections of the Act, the right of retainer remains as it was before the Act, subject to this, that it is enlarged to the extent to which in this sub-section you find it enlarged, and it is diminished to the extent to which in this sub-section you find it diminished; and accordingly I understand that to mean this, that in the case of an insolvent estate there is still the right of retainer which will have to be brought into account and harmonized as best it can be with the rules laid down in Part I. of the Schedule—there is still that right of retainer, modified by way of increase or diminution in the way I have stated.

Now if I am right in approaching this section with the view that it does apply to an insolvent estate and that, in construing it, I am to treat the Crown as in exactly the same position as a subject, except of course in so far as there is some express provision to the contrary, the question propounded to me by this summons seems to me to answer itself. The Crown has such priority as is given to it by what I may speak of as the bankruptcy scale laid down in Part I. of the Schedule—a priority in respect of certain specified amounts of income tax and super tax; but everything in that scale has to be harmonized with, and I see no difficulty in harmonizing it with, the express provision in sub-s. 2, which gives the right of retainer to the personal representative. It is true that so far as that right of retainer operates, it to some extent contradicts, and in so far as the section gives a right to prefer it may be true that to a great extent the sub-section may turn out to nullify the rules, or at least some of the rules, which are referred to in sub-s. 1; but if that is the result, so be it; I see no difficulty in reading the two together in that way. It is said, however, that I can only reach that conclusion by calling in aid something else in the Act—namely, s. 57—which puts the Crown on the same footing as the subject—that by reason of the words in the second paragraph of sub-s. 2 of s. 34 of the Act of 1925: "Nothing in this Act affects the right of retainer," I must not treat s. 57 as in any way affecting the law in regard to retainer; in other words, that I must treat the Crown's rights as untouched by these statutory provisions in regard to retainer. That view I find myself wholly unable to take. I do not think that can be what the Legislature meant. I think Mr. Morton's argument is a sound one, that s. 34, sub-s. 1, when read with s. 57, necessarily involves that the order of application laid down in Part I.—what has been spoken of as the bankruptcy scale—is consistent, and consistent only, with the Crown's privilege of priority being cut down to the particular priority specified by the bankruptcy legislation; and when I come to sub-s. 2 I must treat sub-s. 1 as having that operation, and that the words "subject as aforesaid, nothing in this Act affects the right of retainer" necessarily involve this, that I must have regard to the position in which the Crown has been put by reason of the joint operation of s. 34, sub-s. 1, and s. 57.

However that may be, it seems to me clear that I must read this section of the Act with this in view, that the Legislature is setting out to make a comparatively simple scheme for the administration of estates, which comprises certainly one feature—namely, that the Crown is to lose what I may call its general priority—and which has this second feature, that an executor's right of retainer is, with such modifications only as appear expressly in sub-s. 2, to be operative in respect of the whole extent of the assets of the deceased, and as between the executor and the whole body of creditors, including the Crown; and I so decide.

Accordingly I must answer the first question by determining that the plaintiff's right of retainer may be exercised against His Majesty and in priority to His Majesty's preferential claim for property or income tax under the relevant sections of the Bankruptcy Act, the Administration of Estates Act, and the First Schedule to that Act.

After some discussion it was ordered—counsel for the Attorney-General raising no objection—that the plaintiff's costs should be taxed and paid by the Attorney-General.

H. C. H.

The Crown appealed. The appeal was heard on November 17 and 18, 1930.

J. H. Stamp (*Sir William Jowitt A.-G.* with him) for the appellant. The question is whether the executrix is entitled to retain her whole debt as against the Crown. Before the Judicature Act, 1875, the Crown had a complete priority over all creditors. In the present case the Crown does not claim a more extensive priority than that given by the Bankruptcy Act, 1914—namely, priority for one year's tax. If the matter were at large there would be nothing to displace the Crown's right of priority.

The question however arises whether and to what extent that right of the Crown has been affected by the passing of the Administration of Estates Act, 1925. Sect. 34, sub-s. 1, of that Act is perfectly general in its terms. It provides that "Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to this Act." It is said, however, that under sub-s. 2 the right of an executor to retain still subsists and that the effect of the sub-section is to destroy the Crown's right of preference as against him. The sub-section provides: "The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased . . . ." It is submitted that all sub-s. 2 does is to extend the assets over which the executor can exercise his right of retainer. It is contended on behalf of the executrix here that if she is entitled to exercise her right of retainer against all the assets of the testator, that must mean that she may exercise the right against all assets, including those over which the Crown is entitled to a preference. It is submitted that this is not the proper construction of the sub-section and that the assets over which she is entitled to exercise her right are all the "available" assets, that is, the assets which remain after the claim of the Crown is satisfied. The right of retainer allowed by s. 34, sub-s. 2, of the Act, is limited by the concluding paragraph commencing, "Subject as aforesaid." The exercise of that right is, upon the proper construction of sub-ss. 1 and 2 of s. 34, only exercisable without prejudice to the provision in sub-s. 1 as to the rules in accordance with which an insolvent estate is to be administered. The learned judge took the view that the right of the Crown was made subject to the exercise of the right of retainer of a personal representative in respect of "all assets of the deceased" referred to in sub-s. 2. It is submitted that sub-s. 2, while extending the right of retainer to equitable assets is subject to sub-s. 1, and does not oust any right of priority which might exist. The only alteration in the Crown's right is that effected by r. 2 of Part I. of Sch. I. to the Act, which makes the rules in bankruptcy applicable in the administration of an insolvent estate in regard to priorities. This brings in s. 33 of the Bankruptcy Act, 1914, which is binding on the Crown by s. 151 of the same Act and limits the claim of the Crown to one year's tax. Sect. 34, sub-s. 1, is the dominating provision and the retainer under s. 34, sub-s. 2, is only exercisable while the estate is or apparently is solvent, though it may afterwards prove to be insolvent. The words "subject as aforesaid" in the last paragraph of sub-s. 2 apply to sub-s. 1 as well as the first paragraph of sub-s. 2. There is nothing in s. 34, sub-s. 2, to destroy the Crown's preferential claim so far as it continues under s. 33 of the Bankruptcy Act, 1914. The right of retainer has never been specially favoured by the law.

It is submitted that as soon as it is ascertained that the estate is insolvent sub-s. 1 is let in and sub-s. 2 gives way. It is impossible to reconcile administration in bankruptcy with an executor's right to prefer. The essence of bankruptcy administration is that the assets should be distributed rateably. It does not follow that, because an executor has a right to prefer one creditor to another, he should have a right to disappoint a creditor.

An executor can prefer until sub-s. 1 comes into operation, that is, when it is ascertained that the estate is insolvent. To allow sub-s. 2 to prevail over sub-s. 1 would be to destroy the benefit given to creditors by sub-s. 1.

The second question is whether, if the application of the words "subject as aforesaid" be limited to sub-s. 2 of s. 34 and the right of retainer is not limited to cases when sub-s. 1 does not apply, the common law right of priority of the Crown must be treated as being revived, at any rate to the extent to which it was not taken away by the Bankruptcy Act.

Formerly the right of priority of the Crown prevailed over that of everyone: *In re Rhoades.* (1)

If the Act of 1925 had not been passed the executrix in the present case would have had no right of retainer, as the exercise by the Crown of its right of priority would have exhausted all the assets.

Fergus Morton K.C. and *Norman Daynes* for the respondent. It is said that you cannot apply the right of retainer except where there is an insolvent estate. But that is the only case in which a right of retainer is of any use.

The proviso beginning, "subject as aforesaid," has no application to sub-s. 1. This is made clear by its insertion as a proviso to sub-s. 2, instead of being made the subject-matter of a separate sub-section. If you find that the Crown is bound by the Act of 1925 there is an end of the matter. The right of the Crown would be gone except to the extent it was preserved by sub-s. 1: *In re Laycock.* (2) In that case it was admitted by the Crown that if s. 33 of the Bankruptcy Act, 1914, which bound the Crown, applied to the private administration of a deceased insolvent's estate out of Court, the common law priority would be gone under sub-s. 7.

It is quite sufficient for the executor to rely on sub-s. 2 of s. 34 alone. The words of the section mean that nothing is to be subtracted from the assets before the executor's right of retainer has been exercised. The result of the Administration of Estates Act (Hinde Palmer's Act), 1869, was to enlarge an executor's right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as against simple contract creditors:

(1) [1899] 2 Q. B. 347, 354.
(2) [1919] 1 Ch. 241, 243.

C. A.
1930

COCKELL, *In re.*
JACKSON
v.
ATTORNEY-GENERAL.

In re Harris. (1) The Crown is now placed on the same level as the subject for the purposes of the Act of 1925.

[ROMER L.J. referred to the mention of funeral and testamentary expenses in r. 1 of Part I. of Sch. I. to the Act of 1925 and asked whether the retainer could be said to have priority to such expenses.]

Moneys required for funeral and testamentary expenses are not really to be regarded as "assets" of the testator at all. They must be paid before the executor can begin to administer the estate. It is not until they have been paid that the executor can consider how far he can retain assets and against what creditors he can retain them. It is to be noticed that funeral and testamentary expenses are placed in a class by themselves by the Schedule before the bankruptcy rules are introduced.

The right of retainer is of value only where the estate is insolvent, in which case there can be no death duties.

The nature of retainer is shown by *In re Rhoades.* (2) It is the right to withhold assets from distribution. The old degrees of priority of debts created by the common law are conveniently stated in Halsbury's Laws of England, vol. xiv., p. 247.

The right of retainer was formerly fettered by this that the executor could not retain as against a creditor of higher degree than himself.

An executor is not bound to realize the assets before exercising his right of retainer : *In re Gilbert.* (3) That case indicates that retainer is a right which is exercised by the executor before he commences to distribute the assets.

[LORD HANWORTH M.R. The case seems to imply that the right of retainer remains notwithstanding the relation back of the title of the trustee in bankruptcy.]

Before the Act of 1925 an administration decree did not put an end to the right of retainer although it did to the right to prefer : *Davies* v. *Parry.* (4)

[LAWRENCE L.J. referred to *In re Belham.* (5)]

(1) [1914] 2 Ch. 395.

(2) [1899] 2 Q. B. 347; affirming [1899] 1 Q. B. 905.

(3) [1898] 1 Q. B. 282.

(4) [1899] 1 Ch. 602, 609.

(5) [1901] 2 Ch. 52.

C. A.
1930

COCKELL,
In re.
JACKSON
v.
ATTORNEY-GENERAL.

In *In re Ambler* (1) it was held that s. 3 of the Married Women's Property Act, 1882, did not affect the right of retainer of a married woman who was the executrix of her deceased husband in respect of a loan made by her to him for the purposes of his business.

The right of retainer was not affected by the fact that the personal representative did not acquire that character till after the usual decree had been made in a suit instituted by creditors against the former administrator: *Nunn* v. *Barlow.* (2)

The authorities show that before the Act of 1925, the right of retainer was an anomalous right. It is only the balance of the assets after the exercise by the executrix of her right of retainer which vests in the trustee in bankruptcy: *In re Rhoades.* (3)

[LORD HANWORTH M.R. referred to *In re Whitaker.* (4)]

J. H. Stamp replied.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered :—

LORD HANWORTH M.R. This is an appeal from a decision of Clauson J. given on June 17, 1930. The testator died on June 19, 1929, having by his will, dated June 5, 1919, appointed the respondent, Mrs. Jackson, his sole executrix. Probate of the will was granted on August 2, 1929, and by the terms of it the testator devised to the executrix the whole of his estate and effects absolutely.

The estate, which was valued for probate at 1375*l.* 19*s.* 1*d.*, was found to be insolvent, for the debts stated in the Inland Revenue affidavit amounted to 3344*l.* Some questions arise as to these debts which it is unnecessary to go into. The testatrix has paid the funeral expenses of the testator and certain fees for nursing him in his last illness, and there remains in her hands a sum of about 920*l.* and some shares of no large value which have not yet been realized. Against this amount the executrix claims to exercise her right of

(1) [1905] 1 Ch. 697.
(2) (1824) 1 S. & St. 588.
(3) [1899] 2 Q. B. 347, 351.
(4) [1901] 1 Ch. 9.

C. A.
1930
COCKELL,
In re.
JACKSON
v.
ATTORNEY-GENERAL.
Lord Hanworth M.R.

retainer in respect of 1000*l.* for money lent by her to the testator.

It seems that the testator had not paid his income tax or super tax for several years before his death, and the Inland Revenue Commissioners, for whom the Attorney-General appears, claim to select, as the one year in respect of which a right of priority for assessed taxes is given under s. 33, sub-s. 1, of the Bankruptcy Act, 1914, a year in which the assessment upon the testator in respect of income tax and super tax exceeded 1000*l.*

The point, therefore, to be determined is whether the executrix can exercise her right of retainer as against the priority given to the Crown under the Bankruptcy Act; for this priority, if allowed, would exhaust the estate, equally as the right of retainer, if allowed, would prevent there being any surplus to meet the claim for assessed taxes.

The point is an important one and requires an interpretation to be put upon a section contained in a recent Act—namely, upon s. 34 of the Administration of Estates Act, 1925. It should be stated that in view of the general importance of the matter, the Attorney-General has undertaken in any event to pay the costs incurred by the respondent upon this appeal.

Before dealing with s. 34, it will be convenient to consider how the law stood with regard to an executor's right of retainer before the Administration of Estates Act was passed. It has been decided for a long time that, as one of his privileges he has a right to retain assets in payment of his own debt due to him from the deceased, in preference to all other creditors of equal degree. This right has in effect been enlarged in his favour by Hinde Palmer's Act (32 & 33 Vict. c. 46) of 1869, under which all specialty and simple contract debts of deceased persons are to stand in equal degree after January 1, 1870.

The effect of this Act, as decided in *In re Harris* (1)—and see also *In re Samson* (2)—has been to enlarge an executor's right of retainer in respect of a simple contract debt, by enlarging the class of debts with which that debt competes,

(1) [1914] 2 Ch. 395.

(2) [1906] 2 Ch. 584.

C. A.
1930
COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.
Lord Hanworth M.R.

and over which it may accordingly be given a preference—namely, over what would have been a specialty debt.

The right of retainer was limited, and extended only over legal as distinguished from equitable assets, though the executor could retain in respect of both legal and equitable debts due to him; and his right was not restricted to a debt due to him personally which he claimed beneficially, but also extended to those to which he was entitled as trustee.

The Administration of Estates Act by s. 34, sub-s. 2, affects the retainer in both the above matters. Under it the right of retainer may be exercised over all the assets of the deceased—whether legal or equitable—a very noteworthy extension; but it is restricted, and applies only to debts owing to the executor in his own right. Subject to these two changes, one enlarging and one restrictive, the right of retainer remains.

Previously to the Act of 1925, so far as the principles of bankruptcy were applied to the distribution of a deceased insolvent's estate, they applied only in cases where the estate was being wound up by the Court: see s. 10 of the Judicature Act, 1875, and see *In re Heywood* (1) and *In re Laycock.* (2) Now by s. 34, sub-s. 1, of the new Act the rules of bankruptcy set out in the First Schedule are to apply in all cases where the estate of a deceased person is insolvent, whether or not it is administered by the Court, and correspondingly s. 10 of the Judicature Act, 1875, is repealed.

Debts due to the Crown from an insolvent have gradually been brought within statutory limitations. Under the Bankruptcy Act, 1869, an order of discharge did not release a bankrupt from debts due to the Crown (s. 49), and by s. 32, sub-s. 1, the amount of the taxes assessed upon the bankrupt not exceeding in the whole one year's assessment was to be treated as a preferential debt and given priority in the distribution of assets. But the Crown was held not to be bound by that Act except by the sections in which it was referred to: see *In re Bonham.* (3)

(1) [1897] 2 Ch. 593.
(2) [1919] 1 Ch. 241.
(3) (1879) 10 Ch. D. 595.

C. A.
1930
COCKELL, *In re.*
JACKSON v. ATTORNEY-GENERAL.
Lord Hanworth M.R.

In the Bankruptcy Act, 1883, s. 150, it is expressly provided that the provisions of the Act as to "the remedies against the property of the debtor, the priorities of debts . . . . and the effect of a discharge shall bind the Crown." By s. 40 a priority in the payment of one year's assessed taxes was given as in the Act of 1869, but no more; and the order for his discharge released the bankrupt from all debts provable in the bankruptcy, the only exception made being in respect of a debt chargeable at the suit of the Crown for an offence against a statute relating to any branch of the public revenue. After this statute it seems impossible to say that the Crown had left to it any prerogative right against the estate of the bankrupt. Its right was curtailed and limited by the terms of the Act. As Lord Dunedin said in *Attorney-General* v. *De Keyser's Royal Hotel* (1): "None the less, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules."

Sect. 151 of the present Bankruptcy Act, 1914, is in the same terms as s. 150 of the earlier Act.

The reasoning of Lord Birkenhead in *Food Controller* v. *Cork* (2), in relation to two sections of the Companies Act, 1908, is applicable: "It would have been plainly impossible to adopt this form of legislation if it had been intended that other Crown debts should retain a priority inconsistent alike with the general language of s. 186 and with the motive which led to the specification of admitted exceptions contained in s. 209 [preferential payments]."

New South Wales Taxation Commissioners v. *Palmer* (3) is not in conflict with this view—indeed, it confirms it. It was held there that the Crown was entitled to preferential payment over all other creditors, but on the ground that the Crown's prerogative had not been curtailed. Lord Macnaghten expressly points out that there was no provision in the relevant statute in New South Wales to the same effect as s. 150 of the Bankruptcy Act, 1883. "It is admitted," he says (1), "that the Bankruptcy Act, 1898, does not bind the Crown. It would therefore seem, on principle, that in the administration of the assets under the direction of the Court it was the duty of the Court to give effect to the Crown's prerogative." If there had been a section binding the Crown in the statute its claim by way of prerogative would have been held to be curtailed.

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(1) [1920] A. C. 508, 526.
(2) [1923] A. C. 647, 657.
(3) [1907] A. C. 179.

It seems clear, therefore, that the Crown cannot claim more than its priority in respect of one year's assessed taxes, and the question is whether the right of retainer is effective against those debts which are to be paid in priority to others of the bankrupt.

It is obvious that the right of retainer is valuable to an executor only if the estate is insufficient to pay all the creditors, and the table of debts (in s. 33, sub-s. 1), which are entitled to priority, is a long one. It includes, with certain specified limits of amount, parochial and local rates, four months' salary to clerks, wages of labourers, payments under the Workmen's Compensation Act, 1906, contributions due under the National Insurance Act; and all these, with the debt for assessed taxes, are to rank equally between themselves. Taxes are in no better position than the others.

The Courts have respected carefully an executor's right of retainer. Thus in *In re May* (2)—which was subsequently approved in *In re Ambler* (3) in the Court of Appeal—in the course of the administration of the estate of an insolvent husband by the Court, his widow was allowed to retain out of the assets in her hands as administratrix the amount of a loan made to him in his business, although under s. 3 of the Married Women's Property Act, 1882, her claim for the debt in bankruptcy was postponed to the claims of the other creditors. In *In re Rhoades* (4) she was held entitled to exercise her right, even after payment over to the official receiver, for the right of retainer is that the executor can discharge the debt to himself, and only the balance of the assets after that has been done passes to and vests in the official receiver: see per Lindley M.R. (1)

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(1) [1907] A. C. 183.
(2) (1890) 45 Ch. D. 499.
(3) [1905] 1 Ch. 697.
(4) [1899] 2 Q. B. 347.

In *Davies* v. *Parry* (2) Romer J. felt compelled to allow the claim of retainer of an administrator, in spite of his reluctance to do so, and notwithstanding the terms of the administrator's bond to distribute rateably, and the fact that the assets came into his hands after the decree.

That case was approved in the Court of Appeal in *In re Belham.* (3) The latter case is relevant to the present question. The defendant—the administrator of a deceased insolvent's estate—claimed to exercise his right of retainer to an amount which exhausted the assets except as to 16*l.* 1*s.* 10*d.* The plaintiff in a creditor's action moved to vary the administrator's bond given by the defendant so that it would read "not unduly preferring his own debt, or the debts of any other of the creditors of the deceased by reason of his being an administrator," and claimed that this should be done "so as to carry out the true intention of this Honourable Court"; that is to say, he asked that the respondent should administer the estate of the deceased by paying all and singular the debts which the deceased owed—rateably—and without preferring or giving advantage to the respondent as administrator, and founded his case upon what he conceived to be the true intention of the Court. Gorell Barnes J. in a reserved judgment refused the motion and felt bound by Romer J.'s decision in *Davies* v. *Parry.* (2) The Court of Appeal affirmed this decision. Collins L.J. said (4) that the administration bond wrote out at large what was the duty of an administrator, and that *Nunn* v. *Barlow* (5) distinctly decided that an administration decree was not incompatible with the legal right of an administrator to retain his debt. Stirling L.J. (6) referred to the bond under which the duty was imposed upon the administrator "of paying the debts rateably and proportionably, and according to the priority required by law, and not unduly preferring his own debt," and discussing what was

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(1) [1899] 2 Q. B. 355.
(2) [1899] 1 Ch. 602.
(3) [1901] 2 Ch. 52.
(4) [1901] 2 Ch. 57.
(5) 1 S. & St. 588.
(6) [1901] 2 Ch. 52, 57.

C. A.
1930
COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.

Lord Hanworth M.R.

meant by "unduly preferring his own debt," he said the words meant "that he may not pay his own debt in priority to any debt which, according to law, ought to be paid before it," and he affirmed that the administrator was entitled to use assets that came into his hands to meet his debt, and that such use was not an undue preference on his part.

Later, *In re Ambler* (1) was decided, and the Court of Appeal approved of *In re May.* (2)

Consideration of these cases appears to make it clear that the right of retainer is one which enables the executor to dip into the assets to meet his debt before he begins to distribute the assets to any other creditor, subject to this, that he cannot retain his debt as against a debt of a higher degree. Now, however, the distinction between simple contract and specialty debts in administration has been abolished, and all debts are to be treated as of equal degree.

While of equal degree some debts are to be allowed a priority, but that does not abolish the right of retainer, which was expressly affirmed to remain even though the administrator's bond in terms required the payment of debts according to the priority required by law and thus recognized that there was a priority.

Bearing in mind this privilege of retainer and the priority of certain debts—among them that of the Crown for assessed taxes—I turn to s. 34 with its two sub-sections. It is said that these cannot be read separately, but are conflicting—that sub-s. 2 is to be read as subservient to sub-s. 1. I confess that I do not follow this argument. The Crown is bound by s. 57 of the Act. Its common law prerogative cannot be successfully claimed. In my judgment sub-s. 1 is effective in its plain terms to apply the rules of bankruptcy which are set out in the Schedule to all insolvent estates of deceased persons whether administered by the Court or not.

Then sub-s. 2 makes the two alterations in the right of retainer which have been already noticed, but it does not expressly diminish the right which the above cases prove has been from time to time—even if reluctantly—admitted and

(1) [1905] 1 Ch. 697.

(2) 45 Ch. D. 499.

C. A.
1930

COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.

Lord Hanworth M.R.

preserved. Sub-s. 2 might have made a change in the effective right of retainer by postponing it to Crown or other debts; but it has not done so in terms, and I do not find a reason for saying that the Court must hold that it has impliedly done so.

There remains one further point to be noticed. By r. 1 in the Part of the Schedule applied to the administration of insolvent estates by s. 34, sub-s. 1, " The funeral, testamentary, and administration expenses have priority." It is said that this ignores the right of retainer, and thus it is argued that it cannot be supposed that the right of retainer takes precedence of the debts in this rule—therefore the right of retainer is not recognized, but altered by s. 34 and the Schedule.

I think Mr. Morton's answer meets this point—namely, that the executor or administrator must incur the testamentary expenses before he can get a legal title to the assets, and that reasonable funeral expenses are to be allowed out of the goods of the deceased before any debt or duty whatsoever: see 3 Co. Inst., 202.

The rule merely recognizes what has been the practice for many years, and no inference from it can be drawn in reference to the interpretation to be placed on sub-ss. 1 and 2 of s. 34.

In my judgment the decision of Clauson J. is right and the appeal must be dismissed.

LAWRENCE L.J. The question in this case whether the plaintiff is entitled to exercise her right of retainer as against the Crown depends upon the true meaning and effect of sub-ss. 1 and 2 of s. 34 of the Administration of Estates Act, 1925.

Sub-s. 1, which replaced (in an amended form) s. 10 of the Judicature Act, 1875, applied the bankruptcy rules for the time being in force to the administration of insolvent estates, both when conducted by the Court and when conducted by the personal representative out of Court. The effect of this enactment was to bring the administration of insolvent estates by a personal representative out of Court into line with the administration of such estates by the Court and in bankruptcy, and, incidentally, to overrule the decision of Astbury J. in *In re Laycock* (1), that Crown debts had common law priority in respect of legal assets when an insolvent estate was being administered out of Court, thus rendering it unnecessary in the future for the personal representative, when administering such an estate, to distinguish between legal and equitable assets in so far as Crown debts are concerned.

Sub-s. 2 recognized and amended the right of retainer and the right to prefer creditors theretofore enjoyed by a personal representative.

Before the Act it was settled law that the personal representative had the right to appropriate a sufficient part of the legal assets of the deceased in satisfaction of a debt due to himself (whether in his own right or in a representative capacity) in preference to all other creditors of equal degree; but this right did not extend to assets which the personal representative had not got in and which were not in his possession, nor did it extend to equitable assets. It was also well settled that before a creditor had obtained judgment or before an administration decree had been made or before notice had been given of the presentation of a bankruptcy petition the personal representative had the right, among creditors of equal degree, to pay one in preference to another.

Further, it had been decided that neither s. 10 of the Judicature Act, 1875, nor s. 125 of the Bankruptcy Act, 1883, had deprived the personal representative of his right of retainer: see *In re May* (2) and in *In re Rhoades*. (3) Sect. 125 of the Bankruptcy Act, 1883, is now replaced by s. 130 of the Bankruptcy Act, 1914, which last mentioned section was repealed (apparently by mistake) by the Administration of Estates Act, 1925, but was revived and made permanent by the Expiring Laws Act, 1925.

It had also been decided that the effect of Hinde Palmer's Act (which abolished the distinction as to priority of payment

(1) [1919] 1 Ch. 241.

(2) 45 Ch. D. 499.

(3) [1899] 2 Q. B. 347.

between specialty and simple contract debts) was to enlarge the right of retainer and the right to prefer creditors so as to enable a personal representative to retain a simple contract debt as against a specialty creditor: *In re Harris* (1), and to pay a simple contract creditor in preference to a specialty creditor: *In re Samson.* (2)

Sub-s. 2 of s. 34 of the Act of 1925 on the one hand extended the right of retainer so as to enable it to be exercised in respect of all the assets of the deceased, thus enlarging the range of assets which might be retained and doing away with the necessity (so far as the right of retainer is concerned) of making any distinction between legal and equitable assets, but on the other hand, limited the right of retainer to debts owing to the personal representative in his own right, so that a personal representative could no longer retain a debt owing to him in a representative capacity.

Mr. Stamp contended that the provisions of sub-s. 1 operated to confine the right of retainer and the right to prefer creditors mentioned in sub-s. 2 to cases in which the estate of the deceased, either was in fact solvent or appeared to the personal representative from the assets in sight to be solvent, and that except in such cases the personal representative (at all events when an insolvent estate was being administered out of Court) could not any longer exercise either of those rights. In my judgment this contention is not well founded. It is hardly necessary to point out that the rights in question are of real importance only when an estate is insolvent, and that if the effect of the sub-section were to abolish those rights in cases of insolvent estates their practical value would be gone. The evident intention of the Legislature, as expressed in sub-s. 2, in my opinion, is that the amended rights therein referred to should be enjoyed to the same extent as the unamended rights were formerly enjoyed, and that the words "subject as aforesaid" at the commencement of the concluding paragraph of the sub-section are referable only to the alterations in the right of retainer and in the right to prefer creditors effected by the preceding provisions

(1) [1914] 2 Ch. 395.

(2) [1906] 2 Ch. 584.

of the sub-section and do not embrace the provisions of sub-s. 1.

The question then arises how the two sub-sections are to be reconciled and given practical effect to when an insolvent estate is being administered by the personal representative out of Court. Prima facie no doubt it would appear anomalous that whilst sub-s. 1 imposes upon the personal representative the duty of administering an insolvent estate in accordance with the bankruptcy law, sub-s. 2 recognizes and preserves not only the right of retainer, but also the right to prefer creditors, the latter right especially enabling him to disregard that duty. In my judgment, however, the true effect of sub-s. 2 is that the rights of the personal representative (as amended) are recognized as being what, before the Act, they had been held to be—namely, paramount rights—and that the provisions of sub-s. 1 only come into operation if and so far as those rights are not exercised. As already pointed out, the legal personal representative had not lost his right of retainer or his right to prefer creditors by reason of s. 10 of the Judicature Act, 1875, or by reason of s. 130 of the Bankruptcy Act, 1914, and the right to prefer creditors could, before the Act of 1925, and still can, be put an end to by an order for administration by the Court or by the presentation of a bankruptcy petition. The scheme of sub-ss. 1 and 2 of s. 34, as I understand it, is to place the administration of insolvent estates out of Court so far as possible on the same footing as the administration of such estates by the Court, and, in both cases, to preserve to the personal representative the right of retainer as amended by sub-s. 2.

The practical difficulty realized by the Legislature of abolishing the right to prefer creditors in cases where an insolvent estate is administered by the personal representative out of Court was no doubt that pointed out by Vaughan Williams L.J. in the following passage of his judgment in *In re Samson* (1): "The practical effect . . . . would be that in every case an executor, if he wished to be safe, would have to take care not to pay anybody until there had been

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(1) [1906] 2 Ch. 584, 589.

C. A.
1930

COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.

Lawrence L.J.

an administration judgment, with the result that everyone must be paid pari passu ; but one knows that cases constantly arise in which a prudent man may hope and expect that the estate will turn out solvent, but he may feel that it is possible that it may not, in which case a prudent executor would hold his hand. What would be the result ? Some of the creditors of the testator would probably begin to sue him in the hopes of getting a judgment which might enable them to realize 20*s*. in the pound, and the administration of the estate would immediately be conducted under an administration judgment, because some one creditor, for the protection of himself and all the other creditors, would take care to put an end to the possibility of one of their number getting 20*s*. in the pound by starting an administration action." In my opinion there is nothing in the Act of 1925 to lend colour to the contention of the Crown that if the personal representative were to exercise his rights under sub-s. 2 instead of administering the estate according to the bankruptcy law under sub-s. 1 the common law right of priority of the Crown would revive either as regards the full amount of the debt or as regards the amount in respect of which priority was given to it by s. 33 of the Bankruptcy Act, 1914. Mr. Stamp was compelled to admit that if this contention were to prevail the Crown would by virtue of the provisions of sub-s. 1 have to share the benefit of any priority thus obtained pari passu with the other preferential creditors mentioned in s. 33 of the Bankruptcy Act, 1914, with the result that a novel and somewhat curious method of distributing assets would be introduced into the administration of insolvent estates.

The true answer to any such contention, however, is that in assenting to be bound by the Administration of Estates Act, 1925 (see s. 57), and by the relevant provisions of the Bankruptcy Act, 1914 (see s. 151), the Crown has now waived its prerogative right of priority in the administration of insolvent estates out of Court in the same manner as it had already waived that right in the administration of such estates by the Court and in bankruptcy, with the result that such prerogative right of priority is now completely abrogated, and that the only right remaining in the Crown in respect of its debt is the statutory right under the bankruptcy law. The correctness of this view is borne out by the decision of the House of Lords in *Food Controller* v. *Cork* (1), a case in which the right of priority of the Crown to the payment of its debts in a voluntary winding up was negatived and the nature and extent of the Crown's prerogative rights of priority were considered and explained.

The effect of the total extinction of the Crown's prerogative right of priority in the administration of insolvent estates in my judgment is that the Crown can no longer by reason of that right claim to be a creditor of a higher degree than the personal representative. Consequently, unless the limited preferential right of payment conferred by s. 33 of the Bankruptcy Act, 1914, upon the Crown (pari passu with the other creditors therein mentioned) constitutes the Crown (and presumably those other creditors) creditors of a higher degree than the personal representative, the effect of sub-s. 1 is to enlarge the right of retainer in cases of administration of insolvent estates out of Court and to enable the personal representative in such cases to retain his debt as against the Crown in the same way as he could have done before the Act when an estate was being administered by the Court or in bankruptcy. This result may have been unforeseen, but it follows logically from the abolition of the last remnant of the prerogative right of priority in the administration of insolvent estates. An analogous unexpected enlargement of the right of retainer was brought about by Hinde Palmer's Act: see *In re Harris.* (2)

There only remains the question whether the preferential right to payment conferred by s. 33 of the Bankruptcy Act, 1914, constitutes those entitled to priority thereunder creditors of a higher degree, as against whom the personal representative is not entitled to exercise his right of retainer. The priority in which debts are directed by the Bankruptcy Acts to be paid in the distribution of the property of a bankrupt has apparently not hitherto been considered by the Court as

(1) [1923] A. C. 647.

(2) [1914] 2 Ch. 395.

affecting or interfering in any way with the exercise of the right of retainer of a personal representative where an insolvent estate has been administered either by the Court under s. 10 of the Judicature Act, 1875 : *In re May* (1); *In re Leng* (2); and *In re Ambler* (3), or in bankruptcy under s. 125 of the Bankruptcy Act, 1883: *In re Rhoades.* (4) In *In re Ambler* (3) the widow and executrix of the testator was held to be entitled to retain a loan made by her to him for the purpose of his business, notwithstanding that under the joint operation of s. 3 of the Married Women's Property Act, 1882 (since replaced by s. 36, sub-s. 2, of the Bankruptcy Act, 1914), and s. 10 of the Judicature Act, 1875, she was prevented from proving for such loan in the administration by the Court of her deceased husband's insolvent estate in competition with his creditors for value. Counsel for the creditors opposing the widow's claim contended that the preference given to their debts in the administration of the insolvent estate constituted them creditors of a higher degree than the widow, but the Court did not accede to that contention, deciding the case in the widow's favour on the ground that s. 10 of the Judicature Act, 1875, had not altered the right of retainer and that s. 3 of the Married Women's Property Act, 1882, was not addressed to the subject of retainer.

In *In re Rhoades* (4) the question arose whether the personal representative of the deceased whose estate was being administered in bankruptcy could retain his debt in view of the provisions of sub-s. 5 of s. 125 of the Bankruptcy Act, 1883, which vested the property of the deceased in the official receiver as trustee thereof and directed that he should forthwith realize and distribute it in accordance with the provisions of the Act. The Court upheld the personal representative's right of retainer on the ground that only the balance of the property remaining after the personal representative had retained sufficient to pay his debt could be treated as the testator's assets vesting in the official receiver and distributable by him. Lindley M.R. states (1): "It is true that an executor with a right of retainer has not all the rights of a secured creditor: see *Lee* v. *Nuttall.* (2) He has no right to retain against creditors of a higher degree than himself; but his right to retain is a right to withdraw from the assets in his hands and distributable amongst himself and other creditors of equal degree enough to pay himself in full. His right to retain does not extend to assets which he has not got in and which are not in his possession, nor to equitable assets."

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(1) 45 Ch. D. 499.
(2) [1895] 1 Ch. 652, 657.
(3) [1905] 1 Ch. 697.
(4) [1899] 2 Q. B. 347.

The effect of these cases is that where an insolvent estate is being administered by the Court or in bankruptcy the personal representative can intercept and retain sufficient assets to satisfy his debt and that only the balance of the estate falls to be distributed in the order of priority laid down in s. 33 of the Bankruptcy Act, 1914, the Crown sharing in that balance pari passu with the other preferential creditors. It follows that when an insolvent estate was being administered by the Court or in bankruptcy the personal representative could before the Act of 1925 have retained his debt as against the Crown.

Now that s. 34 of the Act of 1925 makes the bankruptcy rules applicable to the administration of an insolvent estate by the personal representative out of Court and at the same time provides that such application is not to affect the right of retainer I am of opinion that the principles laid down in the above mentioned cases are applicable to the administration of insolvent estates out of Court, as well as to the administration of such estates by the Court, with the result that a personal representative administering an insolvent estate out of Court is entitled in exercise of his right of retainer to withdraw from the assets to be administered by him under sub-s. 1 enough to pay his debt in full and that the real and personal estate to be administered by him under that sub-section is the balance (if any) remaining after such withdrawal.

If this be the right view, it follows that the provisions of

(1) [1899] 2 Q. B. 354.

(2) (1879) 12 Ch. D. 61.

the bankruptcy law as to priority of debts in the distribution of the assets are not addressed to the subject of retainer, and do not operate to constitute the creditors entitled to preferential payments thereunder creditors of a higher degree than the personal representative.

If the contention of the Crown on this point were well founded, sub-s. 1 would have effected a serious alteration and curtailment of the right of retainer theretofore enjoyed by the personal representative, and this, in my opinion, would be contrary to the letter and spirit of sub-s. 2.

For the reasons stated, I agree that this appeal fails and should be dismissed.

ROMER L.J. The question that has to be determined in this case is as to the effect of s. 34, sub-ss. 1 and 2, of the Administration of Estates Act, 1925, upon an executor's right of retainer in the case of an insolvent estate. Before referring to the terms of the section, it will be convenient to consider the rights of retainer possessed by an executor in such a case before the date of the coming into operation of the Act.

The right was one that enabled a legal personal representative who was himself the creditor of the testator or intestate to pay himself out of the legal assets the debt due to him in preference to the claims of creditors of the same class, but not so as to defeat the claims against such assets of creditors of a higher class. An executor, if a simple contract creditor of his testator, could therefore only retain his debt out of the testator's legal assets after making provision for all debts that would rank in priority to the simple contract debts in due course of administration of the testator's estate. Subject to this right and to the somewhat analogous right of preferring one debt of the testator to debts of the same class, his duty was to apply those assets in payment of all the testator's creditors in accordance with their respective priorities. Now, by Hinde Palmer's Act it was provided that in the administration of the estate of every person dying after January 1, 1870, no debt or liability of such person should be entitled to any priority or preference by reason merely that the same was secured by or arose under a bond, deed or other instrument under seal or was otherwise made or constituted a specialty debt, but that all the creditors of such person, as well specialty as simple contract, should be treated as standing in equal degree and be paid accordingly out of the assets of the deceased person, whether such assets were legal or equitable, any statute or other law to the contrary notwithstanding. After the coming into operation of this Act, the question naturally arose as to whether it had or had not enlarged the executor's right of retainer, that is to say, whether an executor who was a simple contract creditor of his testator could retain his debt out of his testator's legal assets without making provision for payment of the testator's specialty debts, and it was held by Kay J. in *In re Jones* (1) that the Act ought not to be so considered as to give to an executor in such a case the power to defeat specialty as well as simple contract creditors. This decision appears to have been followed in the Courts of first instance until the Court of Appeal in *In re Samson* (2) held that the effect of the Act was to enable an executor to prefer simple contract creditors to the prejudice of specialty creditors. Buckley L.J., in delivering judgment in the case, said (3): "The question for our decision is whether in administration it was right, after Hinde Palmer's Act, for the executor to pay the simple contract creditors in full, leaving a specialty creditor to some extent unpaid. To my mind the true construction of Hinde Palmer's Act is simply this. It begins by a recital which recognizes that at the date of the Act there were creditors of two classes, of which the one class had a priority over the other class: the operative part of the Act provides that there shall not be two classes in future; that a specialty shall give no priority or preference; that all creditors, specialty and simple contract, shall stand in equal degree."

The members of the Court expressly refrained from deciding whether the executor's right of retainer had been similarly enlarged, though the decision and the reasons given for it

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(1) (1885) 31 Ch. D. 440.
(2) [1906] 2 Ch. 584.
(3) [1906] 2 Ch. 593.

C. A.
1930

COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.

Romer L.J.

would seem logically to indicate that it had been. Accordingly, in *In re Harris* (1) it was held by Sargant J., notwithstanding the earlier decisions in Courts of first instance, that the result of the Act was to enlarge the executor's right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as simple contract creditors, being of opinion that this result followed from the decision in *In re Samson.* (2) The result of Hinde Palmer's Act therefore was to enlarge the executor's right of retainer and his right of preference not by any express words, but merely by reason of the fact that it had altered the order of priority in which the testator's debts had to be paid by putting specialty debts upon the same footing as simple contract debts.

I may now turn to s. 34 of the Administration of Estates Act, 1925. That section provides by sub-s. 1 that where the estate of a deceased person is insolvent his real and personal estate shall be administered in accordance with the rules set out in Part I. of the First Schedule to the Act, and Part I. of that Schedule provides as follows :—

" 1. The funeral, testamentary, and administration expenses have priority.

" 2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

Now the rules under the law of bankruptcy as to priority of debts and liabilities will be found in s. 33 of the Bankruptcy Act, 1914. By that section it is provided, so far as seems to be material for the present purpose, that the debts mentioned in sub-s. 1 are to have priority over all other debts, and as between themselves shall rank pari passu and that all other debts are to rank pari passu.

(1) [1914] 2 Ch. 395.

(2) [1906] 2 Ch. 584.

C. A.
1930
COCKELL, *In re.*
JACKSON *v.* ATTORNEY-GENERAL.
Romer L.J.

It is said by Mr. Stamp, on behalf of the Crown, that sub-s. 1 of s. 34 of the Act of 1925, if standing by itself, would necessarily destroy the executor's right of retainer and the executor's right of preference. That this would be the effect of sub-s. 1 standing alone if it provided that where the estate of a deceased person is insolvent it shall be administered in bankruptcy or as though it were a bankrupt's estate must, I think, be conceded. The Bankruptcy Act, 1914, makes no provision for any such rights, which rights would be inconsistent with the scheme of the Act. The sub-section does not however provide for an administration in bankruptcy or as though the testator or the deceased person were a bankrupt. It merely provides in effect that the executor or other personal representative shall, in administering the estate of an insolvent testator or intestate observe, amongst other things, the rules as to the priority of debts and liabilities contained in the Bankruptcy Act. Just therefore as before the Act of 1925 the legal personal representative had, in administering the estate, to observe certain rules as to the priority of debts and liabilities, so now he has to administer the estate observing other rules as to the priorities of the debts and liabilities; and, just as the old rules as to priorities did not prevent him from retaining his own debt as against creditors of his own class, or from preferring one creditor over other creditors of the same class, so, I should have thought, had sub-s. 1 stood by itself, he would have still retained, after the coming into operation of the Act of 1925, the right of retaining his debt as against creditors of the same class and of preferring one creditor to other creditors of the same class, though the creditors are now divided into different classes from those into which they were divided before.

It is no doubt provided by s. 33, sub-s. 7, of the Bankruptcy Act, 1914, that subject to the provisions of that Act all debts proved in the bankruptcy shall be paid pari passu. This provision for payment is not however introduced into the administration of insolvent estates by the Act of 1925 as I read it. The Bankruptcy Act must be referred to in administering an insolvent estate for the purpose of ascertaining the priorities of the debts and liabilities. But the obligation of the executor to pay the debts and liabilities comes, not from the Bankruptcy Act, but from s. 34, sub-s. 1, of the Administration of Estates Act, 1925, which provides that the estate shall be administered. In that administration all the debts to which priority is not given by the Bankruptcy Act are to rank pari passu, just as before 1926 all debts of the same class ranked pari passu. But there would seem to be no greater obligation imposed on the executor to pay them pari passu than there was before. The Bankruptcy Act must also be looked at for the purpose of ascertaining "the respective rights of the secured and unsecured creditors." But this, I think, means no more than the "relative" rights of the two classes. I cannot read it as though it said, "the rights of the creditors whether secured or unsecured." If that had been the intention of the Legislature, there could have been no object in the subsequent reference to the priorities of debts and liabilities.

I ought to add that it was held by Astbury J. in *In re Laycock* (1) that sub-s. 5 of s. 33 of the Bankruptcy Act does not apply to an administration of a deceased's insolvent estate out of Court. We were not asked to review this decision and we heard no argument upon the point. I therefore assume for the purposes of this judgment that the case was rightly decided. I will only add that as at present advised I see no reason for thinking that it was not.

It is now necessary, however, to refer to sub-s. 2 of s. 34 of the Administration of Estates Act, 1925. It begins as follows: "The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person."

It was contended by Mr. Stamp that this sub-section does not apply at all to insolvent estates. I cannot agree with that contention. Coming, as it does, immediately after the sub-section that deals with insolvent estates, and before

(1) [1919] 1 Ch. 241.

sub-s. 3 that deals with solvent estates, the argument appears untenable. But it was argued by Mr. Morton, on behalf of the executrix, and this argument prevailed before Clauson J., that the effect of these words is that the executor's right of retainer and right of preference have now been enlarged, and that the rights can now be exercised to the prejudice of any creditor of the testator of any class. This result, it is said, follows from the fact that the right of retainer and right to prefer may now be exercised in respect of "all assets" of the deceased. Clauson J. in his judgment dealt with this point as follows. He said that in respect to the right of retainer all assets of the deceased are placed on the same footing, and that, inasmuch as before the Act the right of retainer of an executor did not apply to all assets of the estate, not even to all legal assets, but only to such legal assets as were available after provision had been made for creditors of superior degree to that in which the executor's debt ranked, the Legislature in sub-s. 2 had with reasonable plainness laid it down that there should be no such distinction as that which at some time prevailed in regard to creditors of varying degrees. But, with all respect to the learned judge, I doubt if it was correct to say that under the old law the whole of the legal assets were not subject to the executor's right of retainer. It would, I think, be more accurate to say that all such assets were subject to the right, but that the right could not be exercised to the prejudice of creditors of superior degree. In my opinion the only effect of the first part of sub-s. 2 is to enable the right of retainer and the right to prefer to be exercised out of all the assets of the testator to the same extent, and to the same extent only, as, but for the sub-section, it could have been exercised out of legal assets, with this exception, that the right of retainer is now restricted to debts owing to the personal representative in his own right and no longer extends to debts owing to the executor as trustee for others and the like.

If therefore sub-s. 2 ended there, I should have been of opinion that the rights of retainer and of preference remained as they were before the Act, with the following exceptions: (1.) The rights could henceforth be exercised in respect of all assets, whether legal or otherwise; (2.) in exercising the rights the priority of debts to be observed is that specified in the Bankruptcy Act; (3.) the right of retainer can only be exercised in respect of a debt owing to the personal representative in his own right. But the sub-section continues as follows: "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors." If the words "Subject as aforesaid" be treated as referring only to the earlier provisions of sub-s. 2 this addition to the sub-section creates some difficulty. For if the construction I should have put on sub-ss. 1 and 2 if this addition had been omitted be the right one, the right of retainer and the right of preference would certainly be affected, in some cases for the better, in other cases for the worse. It is suggested that the word "prejudicially" should be read into the sub-section before the word "affects." But I can see no justification for doing this. The words "Subject as aforesaid" must at any rate be referring to the provisions of the earlier part of the sub-section, and one of those provisions alters the rights for the better and not for the worse.

But do these words "Subject as aforesaid" relate only to the earlier part of the sub-section, or do they relate also to the provisions of sub-s. 1? In my opinion they do also refer to the provisions of sub-s. 1 which, as I have construed it, do affect the rights both of preference and retainer. If this be not so, then the rights of retainer and preference which are not to be "affected" must be those that would have existed but for the Act, except to the extent that they are modified by sub-s. 2. The result of this would be that for the purpose of exercising those rights the order of priority of debts existing before the Act would have to be observed, and a different order of priority, videlicet, that introduced by virtue of sub-s. 1, would apply to the administration of the rest of the estate after the rights had been exercised. This construction would lead to a somewhat fantastic result, and is not therefore one that should be adopted unless the words of the Act leave no alternative. In my judgment, there is the alternative that I have indicated, and it is a construction that does not affect the rights existing before the Act to any greater extent than is necessary to adapt them to the new scheme of administration. The construction for which the respondent contends on the other hand would result in those rights being affected to a much greater extent, and one that is less in accord with the scheme of the Bankruptcy Act. It would enable the personal representative to exercise his right of preference so as to deprive the Crown of any dividend in respect of debts due to it from an insolvent estate, and I think that Mr. Stamp was justified in saying that it is only too probable that the right in many cases would be exercised in this way. The right of preference can no doubt be put an end to by obtaining an order for administration of the estate by the Court. But the harm might be done before the Crown or any other preferential creditor was in a position to apply for such an order.

I am not prepared to adopt a construction that would result in so great an extension of the right of preference unless the words of the Act permit of no other. In my opinion, the Act does permit of the other construction which I have indicated. With great deference, therefore, to the other members of the Court who have arrived at a different conclusion, I think that the order of Clauson J. should have been discharged and a declaration made that the plaintiff's right of retainer may not be exercised to the prejudice of any preferential claim of His Majesty under s. 33, sub-s. 1 (*a*), of the Bankruptcy Act, 1914, and s. 34 of the Administration of Estates Act, 1925, and the First Schedule to that Act.

I only wish to add one or two words about some of the authorities cited to us dealing with s. 10 of the Judicature Act, 1875. Speaking for myself, I do not think that they assist in construing the Administration of Estates Act, 1925, inasmuch as the section only related to an administration by the Court and contained a reference to the rules of bankruptcy in language different from that employed in Part I. of the

C. A.
1930
Cockell,
In re.
Jackson
v.
Attorney-General.
Romer L.J.

First Schedule to the Act of 1925. There was, for instance, at one time some doubt whether s. 10 of the Act of 1875 imported the bankruptcy rules as to priority of debts inter se at all, and it was not until the decision of the Court of Appeal in *In re Leng* (1) that it was settled that those priority rules were so imported. In the meantime it had been held by North J. in *In re May* (2) that a widow as administratrix of her insolvent husband was in an administration action entitled to retain a debt due to her which in bankruptcy would have been postponed to other creditors by virtue of s. 3 of the Married Women's Property Act, 1882. For it had been held by the Court of Appeal in *Lee* v. *Nuttall* (3) that s. 10 of the Judicature Act had not affected an executor's right of retainer on the ground apparently that the sole object of the section was to get rid of the rule in Chancery under which a secured creditor could prove for the full amount of his debt and realize his security afterwards. Now in *In re Leng* (1) the Court of Appeal took a different view of the section, and held that in such a case the widow could not prove in competition with other creditors. In other words, it held that the section had altered the rules of priority. The Court, nevertheless, distinguished *In re May* (2) on the ground that that case was dealing not with the question of proof but of retainer, and Lindley L.J. said (4): "The Legislature has not yet thought proper to alter the law of retainer, and s. 3 of the Married Women's Property Act is not addressed to that subject." In consequence of this the Court of Appeal in *In re Ambler* (5) held that in a similar case a widow executrix might retain. If s. 10 of the Judicature Act, 1875, had not introduced the bankruptcy rules as to the priorities of debts, as was thought in *Lee* v. *Nuttall* (3), obviously there was nothing in the section that prevented an executrix retaining in such circumstances. But if, as the Court of Appeal held in *In re Leng* (1), these rules had been so introduced, it was arguable, at any rate, that the right

(1) [1895] 1 Ch. 652.
(2) 45 Ch. D. 499.
(3) 12 Ch. D. 61.
(4) [1895] 1 Ch. 652, 657.
(5) [1905] 1 Ch. 697.

of retainer was affected, inasmuch as such a right cannot be exercised so as to defeat claims of creditors of a superior degree. This aspect of the matter was not dealt with by the Court, and they treated the old rule that the right of retainer could be exercised, notwithstanding a decree for administration, as being unaffected by the section. Now, the right of preferring creditors was always defeated by such a decree even before the Judicature Act, inasmuch as the payment of the creditors was taken out of the hands of the legal personal representative and was vested in the Court. The right of retainer, however, was not so defeated. This was decided in *Nunn* v. *Barlow* (1), on the ground that a decree for administration did not affect the legal priorities of creditors; and in *Davies* v. *Parry* (2) and in *In re Belham* (3) this decision was held to be unaffected by the terms of a creditor's administration bond, and was applied in cases which came within s. 10 of the Judicature Act. The retainer, it was held, was not an "undue" preference by the administrator of his own debt. But the fact is that the rule of equality amongst creditors of the same degree was only applied by the Courts of equity to the assets which the Court could distribute, and if any legal assets passed through the hands of the legal personal representative on their way to the Court, all that reached the Court was the residue of such assets after the right of retainer had been exercised. This is the ground upon which it was held that a right of retainer was not defeated by an administration in bankruptcy under s. 125 of the Bankruptcy Act: see *In re Rhoades* (4) and *In re Gilbert.* (5) All that passed to the official receiver under that section were the assets coming to the hands of the legal personal representative after he had exercised his right of retainer. But s. 34, sub-s. 1, of the Administration of Estates Act, 1925, relates to an administration by the legal personal representative as well as to an administration by the Court. I am, therefore, unable to see

(1) 1 S. & St. 588.
(2) [1899] 1 Ch. 602.
(3) [1901] 2 Ch. 52.
(4) [1899] 2 Q. B. 347.
(5) [1898] 1 Q. B. 282.

C. A.
1930
COCKELL, *In re.*
JACKSON
v.
ATTORNEY-GENERAL.
Romer L.J.

what bearing the cases I have referred to have upon the question now to be determined. The administration in the present case is in the hands of the executrix, and the rules of bankruptcy as to priority of debts applies to the assets to be administered by her. In the view that I take those rules must now be regarded by her as taking the place for the purposes of retainer and preference of the rules of priority of debts that prevailed before the Act came into force.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Keene, Marsland, Bryden & Besant.*

W. I. C.

C. A.
1930
Dec. 15.

FRANKENBURG *v.* FAMOUS LASKY FILM SERVICE, LIMITED.

[1929. F. 4074.]

Considered. REED *v.* GRAY [1952] 1 Ch. 337

Costs—Taxation—Compromise of Action before Trial—Defendants to pay Plaintiff's Costs as between Solicitor and Client—Costs incurred before Issue of Writ—Costs of third Expert—Discretion of Taxing Master—Rules of Supreme Court, Order LXV., *r.* 27, *sub-r.* 29.

In July, 1929, the plaintiff ascertained that the defendants were proposing to pull down their existing premises in Manchester and to erect upon the site thereof a cinema or theatre. Fearing that the erection of the defendants' new premises would interfere with the ancient lights of the premises which he owned, and which were immediately opposite those of the defendants, he consulted his solicitor and had plans and elevations prepared of the defendants' premises before demolition. Negotiations for a settlement having failed, the plaintiff on September 7, 1929, issued his writ out of the Manchester District Registry for an injunction to restrain the defendants from interfering with his ancient lights. The action did not proceed to trial but was compromised on the terms that an inquiry should be directed as to damages, which were subsequently assessed at over 1400*l.*, and that the defendants should pay the plaintiff his costs as between solicitor and client. In taxing the plaintiff's costs the District Registrar allowed the costs incurred by the plaintiff before the issue of the writ and also the costs of three experts. On a summons by the defendants to review taxation Bennett J. disallowed these costs.

On appeal:—

Held, that the allowance of the costs before the issue of the writ was a matter within the discretion of the Registrar, whose duty it was to consider all the facts of the case and to allow all such costs as in his opinion had been properly incurred before action brought in obtaining materials which would be useful to the plaintiff at the trial, and that the Registrar having proceeded on a right principle and upon the evidence before him, the Court would not interfere with the exercise of his discretion.

Pêcheries Ostendaises (*Soc. Anon.*) v. *Merchants' Marine Insurance Co.* [1928] 1 K. B. 750 applied.

Held, also, that the Registrar having found that the circumstances of the case were exceptional was justified in allowing the costs of a third expert.

Graigola Merthyr Co., Ld. v. *Swansea Corporation* [1927] W. N. 30 does not lay down a hard and fast rule that in no case will the costs of a third expert be allowed. The rule is a general rule of practice to be followed in ordinary cases which must yield where the circumstances are exceptional.

Decision of Bennett J. reversed.

APPEAL from a decision of Bennett J.

In July, 1929, the plaintiff ascertained that the defendants were proposing to pull down their existing premises in St. James' Street, Manchester, and to erect upon the site thereof a cinema or theatre. The plaintiff, who owned premises in the same street opposite to those of the defendants, fearing that the erection of the defendants' new buildings would interfere with his ancient lights, consulted his solicitor. Correspondence then ensued between the solicitors of the plaintiff and the defendants, which is referred to in the judgment of the Master of the Rolls, and plans and elevations of the defendants' premises before demolition were prepared by the plaintiff's architect and experts.

Negotiations for a settlement having failed the plaintiff on September 7, 1929, issued his writ in the action out of the Manchester District Registry for an injunction to restrain the defendants from interfering with the plaintiff's ancient lights.

The action did not however proceed to trial, but was settled, and by an order by consent dated January 14, 1930, all further proceedings were ordered to be stayed on the

C. A.
1930
FRANKENBURG
v.
FAMOUS LASKY FILM SERVICE, LD.

following terms: (1.) that the defendants should pay the plaintiff his costs of the action to the date of the order as between solicitor and client, such costs to be taxed in default of agreement; (2.) that P. J. Waldron and D. Y. Pitts should be appointed to inquire into and decide what damages the plaintiff was entitled to in respect of any illegal obstruction to the access of light to such of the windows in the plaintiff's buildings as might be ancient lights by reason of the erection by the defendants of a cinema or theatre, and if they disagreed they should appoint an umpire; (3.) that the fees and expenses of Waldron and Pitts and the umpire should be paid by the defendants; and (4.) that the defendants should pay the amount of the damages assessed immediately they were ascertained.

The damages were subsequently assessed at a sum of over 1400*l.*

The costs were duly taxed by the District Registrar in the ordinary way, and subsequently the defendants lodged objections which were considered and replied to by the Registrar.

The principal items of the plaintiff's bill of costs to which objections were taken by the defendants were the following:—

"Expert Witnesses' Fees.

271.	J. H. Maybury & Son, 19 Chapel Walks, Manchester (as per account) . .	186	7	6
272.	Joseph Swarbrick & Son, 30 St. Ann Street, Manchester (as per account) .	166	5	0
273.	Edmund Kirby & Sons (D. Y. Pitts), 5 Cook Street, Liverpool (1929, October 19th, to 1930, January 14th, as per account)	72	12	3
		£425	4	9"

The objections to these items and the Registrar's answers thereto were as follows:—

No. 271. "The total amount of this charge is excessive and the whole of the work done is not chargeable as against the defendants because a large portion is in respect of advising the plaintiff prior to and during the action." To that the Registrar answered: "I have again gone carefully through the charges of this witness and have disallowed a further *5l. 5s.* I am satisfied that the remaining charges are reasonable and necessary for the plaintiff's case."

Nos. 272 to 273. "That the writ in this action not being issued until September 7, 1928, the items charged in these accounts of the expert witnesses prior to that date are not properly chargeable against the defendants, being unnecessary and improper and unusual charges as against the defendants and prematurely incurred through the plaintiff's over-caution within the meaning of Order LXV., r. 27 (29.); that so far as they were incurred after that date they were special and unusual charges and expenses to witnesses which were not properly chargeable to the defendants, or not to the total of the total sums set out in the plaintiff's bill of costs."

To that the Registrar answered: "I have carefully considered the question of expert witnesses. This is an action for infringement of the plaintiff's right to light by reason of building operations of the defendants. The plaintiff's case involved the preparation of elaborate plans and investigation by an architect and founded on these very intricate calculations and drawings by two skilled experts. I have therefore allowed, as an exceptional case, three expert witnesses."

The defendants thereupon took out a summons to vary the Registrar's certificate.

The summons was heard by Bennett J., who on November 27, 1930, made an order that the taxation should be referred back to one of the Taxing Masters in London to vary the District Registrar's certificate in the following manner—namely: "Disallow such part of the charges of J. H. Maybury (item 271) as were incurred before action brought. Discharge such portion of the charges of Joseph Swarbrick (item 272) as relates to work done before action brought with a view of considering whether the action ought to be brought. Disallow the charges of D. Y. Pitts (item 273) on the ground that there were no exceptional circumstances to justify the employment of a third expert witness."

The grounds on which Bennett J. based his order were that the items in Maybury and Swarbrick's accounts were incurred not for the purposes of the action but to enable the plaintiff to ascertain his legal position, and were not costs of the action, and as regarded Pitts that there were no exceptional circumstances in the case to justify the employment of a third expert witness.

The plaintiff appealed. The appeal was heard on December 15, 1930.

R. Fortune for the appellant.
B. B. Stenham for the respondents.

The arguments sufficiently appear from the judgments and from the objections and the Registrar's answers thereto.

LORD HANWORTH M.R. This appeal must be allowed. We have come to a conclusion different from that reached by Bennett J., to whom, perhaps, the strenuous and, if I may say so, seductive argument of Mr. Stenham appealed (as it has appealed to us), an argument which was presented with a life which very often does not belong to reviews of taxation. We are grateful to him for it, but we have come to the conclusion that his argument fails.

The point we have to determine is whether or not Bennett J. was right in reversing a decision which had been come to by the District Registrar upon a review of a taxation asked for by the parties. I must state the facts quite shortly. In July of 1929 the defendants were minded to pull down certain existing premises and build others upon the site on a more extensive scale. As soon as that was known, Ernest Mason, the solicitor of the plaintiff, acting on his behalf, wrote on July 1, 1929, to Ryder, the defendants' solicitor, a letter in which he stated that he had been consulted as to the proposed erection by the defendants of a theatre in Manchester, and that "From the plans which have been submitted by Mr. Dunks on behalf of your client, the proposed new building will seriously interfere with the ancient lights attached to the premises fronting St. James' Street, belonging to my client, and I have therefore been instructed to inform you that my client will apply for an injunction unless I hear from you that you do not intend to exceed the height of the present buildings belonging to you." In reply Ryder wrote on July 15 that he had been retained and instructed by the defendants to deal with the matter. On July 16 he again wrote: "I took up with the architect acting for my client, your remarks that plans deposited at the Town Hall differed in height from the plans as submitted by Mr. Dunks" and so on, and added: "I shall be obliged if you kindly inform me at your earliest convenience, that your architect"—that is the architect acting for the plaintiff—"has checked the elevation I left with you yesterday, as my client is desirous of starting demolition of the building." Demolition of the building, of course, would remove a part of the evidence which it was necessary to lay before the Court if and when the matter passed into litigation. On July 20 Ryder again asked whether the plaintiff's architect had checked the elevation, and on August 6 he again wrote about the plaintiff's architect and of a conference that they were all to have, and said: "After the conference I will be in a position to deal with the proposal made at our interview on the 15th ult. with yourself, Mr. Dunks and the writer, that I should on behalf of my clients make an offer to compensate your clients for any damage to light which may be sustained." I pause there. It is quite clear that negotiations were pending between the parties, that the plaintiff had taken up a firm attitude, that he had expressed his intention of obtaining an injunction unless his desires were met, that the defendants had pointed out that it might be possible to reach an agreement, and on both sides it had been clearly indicated that both of them were armed with the advice of architects who would be required to give expert opinion in order to guide the respective parties. After that matters proceeded; and various drawings were made and the like, until September 7, 1929, when the writ in the present action was issued asking for an injunction to restrain the defendants from causing a nuisance to the plaintiff's buildings. On January 14 the action was settled on the terms of the defendants paying costs as between solicitor and client, and it being referred to certain named experts to determine how much ought to be paid by way of damages to the plaintiff. Those damages have recently been fixed, and we are told that they amount to a sum of over 1400*l.*, a figure that clearly indicates that there was substantial and indeed serious injury to the plaintiff's premises. If the action had gone on it is clear that expert evidence would have had to be called on the part of the plaintiff in order to establish that he had suffered the nuisance and certainly to quantify it as not being one of what might be called partial injury but one of serious disturbance to the plaintiff's enjoyment of light, for which a sum of not less than 1400*l.* was required for compensation.

In the course of taxing these costs, which were to be taxed as between solicitor and client, objection has been taken by the defendants that the amount allowed by the Registrar has been too liberal in respect of two matters. First, it is said that an allowance has been made in respect of fees incurred to architects before the writ was issued, that those fees must have been incurred in order to advise the plaintiff whether to bring an action or not and what his true legal rights were, and were not incurred in reference to the presentment of the case to the Court. The second point is that the Registrar has allowed three experts to the plaintiff and required the defendants to make payment in respect of those three experts, whereas there is a rule applied by Tomlin J. in *Graigola Merthyr Co., Ld.* v. *Swansea Corporation* (1), that two experts, even in a very serious subsidence case, and two only, should be allowed.

The Registrar, when the matter was brought to his attention again for the purposes of review, dealt with the objections taken in this way. With regard to the first, the Registrar answered: "I have again gone carefully through the charges of this witness and have disallowed a further

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(1) [1927] W. N. 30.

5l. 5s. I am satisfied that the remaining charges are reasonable and necessary for the plaintiff's case."

Now when did the plaintiff's case begin? It is quite clear that it did not begin at the time of the issue of the writ. The action was threatened as early as the date at which the very first letter to which I have referred was written—namely, July 1, 1929. It was then that the plaintiff's solicitor said that he would apply for an injunction. It is obvious that at that time any prudent plaintiff or intending plaintiff would have taken the trouble to be advised as to what his rights were and as to the evidence that he would have to adduce in order to substantiate his claim. More than that, the letter of July 16 contemplates on the part of the defendants that the plaintiff was being advised by an architect and also gives notice fairly enough to the plaintiff of the defendants' intention of starting demolition of the building at once, and before ever that demolition took place it was obviously necessary that there should be an expert examination, with drawings and the like, for the presentation of the evidence as to the condition of the building before demolition. This was all passing at a time from July 1, 1929, onwards during the two months that elapsed while negotiations were going on, before the writ was issued; and this letter on August 6 shows that the plaintiff was wisely incurring these expenses on advice, for there was then a suggestion that it would be possible for the defendants to make an offer to compensate the plaintiff for any damage done to his light.

I think Mr. Stenham would go so far as to say that, broadly speaking, there cannot be any claim for costs incurred before the writ is issued, because one must mark a wide divergence between expenses incurred with a view to proof at the trial and expenses incurred with a view to advising a plaintiff whether or not he should incur the expenses of litigation. It appears to me that *Pêcheries Ostendaises* (*Soc. Anon.*) v. *Merchants' Marine Insurance Co.* (1), to which reference has been made, is both a binding and a guiding authority to us on this point. I do not at all shrink from or desire to vary the

(1) [1928] 1 K. B. 750.

C. A.
1930
FRANKENBURG
v.
FAMOUS
LASKY
FILM
SERVICE,
LD.
Lord Hanworth
M.R.

words which I used in that case (1): "It appears to me, therefore, that there is power in the Master to allow costs incurred before action brought, and that if the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs, which he probably will exercise in favour of the party incurring them, because they have been made use of during the course of the action." It is said that those words are too wide, and that they ought not to be "in respect of materials ultimately proving of use and service in the action," but that they ought to be cut down to the words which Atkin L.J. used, in the same case, "where necessary or proper for the attainment of justice." As I say I do not shrink from the words I used. I think that when I speak of costs in respect of materials "ultimately proving of use and service in the action" I mean as being proper for the attainment of justice in that case. They would not be of value or service in the action unless they were relevant to some of the issues which had to be tried and in respect of which justice was sought. I do not desire to embellish or to withdraw from the words I then used. It appears to me that that case is abundant authority for allowing, as the Registrar has allowed, these costs before action. It is to be observed that in the *Pêcheries Ostendaises* case (2) the plaintiff's bill of costs which were to be paid was taxed on the basis of party and party, and that in the present case the costs are to be taxed on the basis of solicitor and client, but the difference between party and party and solicitor and client costs is undoubtedly this, that the solicitor and client costs are intended to embrace a more generous allowance for the actual costs which have been incurred by the plaintiff. It appears to us, therefore, that these costs incurred before action are costs which may be fairly attributable to the conduct of the defendants and thus within the costs which it was contemplated would have to be paid by the defendants. The Registrar in his answers to objections has said: "I am satisfied that the remaining charges are reasonable and necessary for the plaintiff's case." A proper

(1) [1928] 1 K. B. 757.

(2) [1928] 1 K. B. 750.

and a wide discretion must always be left to the Taxing Master in such matters. It appears to us on this point that the Registrar has clearly advised himself in accordance with the authorities, and certainly it is not right on the part of this Court or any Court to upset his discretion, exercised judicially, upon a matter which is emphatically for the discretion of the Taxing Officer, who is an officer charged with a very difficult duty, and one which is only made possible by his experience.

With regard to the second point, that is the allowance of the third expert, the Registrar has said this: "I have carefully considered the question of expert witnesses. This is an action for infringement of the plaintiff's right to light by reason of building operations of the defendants. The plaintiff's case involved the preparation of elaborate plans and investigation by an architect and founded on these very intricate calculations and drawings by two skilled experts. I have therefore allowed, as an exceptional case, three expert witnesses." It is quite clear that the Registrar has treated this case as an exceptional one. Mr. Stenham has rightly called our attention to what Tomlin J. did in the *Graigola* case (1), and I will also call attention to the actual statutory terms of the Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 Geo. 5, c. 57), s. 3, sub-s. 1, which are: "In any proceedings before an official arbitrator, not more than one expert witness on either side shall be heard unless the official arbitrator otherwise directs." The case before Tomlin J. (1) and the statutory provision to which I have just referred clearly and cogently indicate that there is a determination on the part of the Courts that the number of expert witnesses should be limited as far as possible. At the same time, in the statutory provision there is a possible exception where the official arbitrator "otherwise directs": I am also clear that Tomlin J. did not intend that the rule laid down by him should be a rigid and iron rule applicable to all cases.

That being so, we have to consider whether this is an exceptional case. The Registrar has said it is, and there is evidence, I think, on which he could come to that conclusion. It would be highly inconvenient if these matters were to be debated again before the Court, for the Court is not well equipped for the purpose of coming to a conclusion on these detailed matters of a bill. The Registrar has said, that going through the matter carefully, the plaintiff's case did involve elaborate plans and investigation by an architect, and so on, and that he has therefore allowed, "as an exceptional case, three expert witnesses." I agree with him that it must be an exceptional case to justify the allowance of three expert witnesses. I should be very sorry if our judgment in this case should in any way tend to enlarge the number of expert witnesses to be called or show any variance from the principle which underlies Tomlin J.'s decision in the *Graigola* case. (1) It is rather because we affirm the principle of that case that we have come to the conclusion that we cannot accept Bennett J.'s decision and overrule the decision of the Registrar. If it had been a case in which the Registrar had gone wrong, because he had not had before him any evidence which would justify him in finding that it was an exceptional case, it might have been said that the Court could eliminate the third witness. But that does not seem to us to have been the case. The case appears to have been one of difficulty and substance, and one in which considerable damages were allowed. In that view of the facts it appears to us to be one which lay within the discretion of the Registrar to determine. We cannot interfere with that decision, although we do issue the caution that it must be an exceptional case if three expert witnesses are to be allowed, and it can only be that that allowance should be made in cases where, either because of the weight or the complexity of the matter, or for some other good reason, it is wise to give that third assistant to the one side or the other.

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(1) [1927] W. N. 30.

Having regard, therefore, to the fact that the Registrar appears to have guided himself rightly, we feel that it is not possible for a judge, any more than for this Court, to upset his decision. Bennett J. seems to have overlooked the weight and validity of the Registrar's discretion and to have gone into the matter himself. It may be that if we had been taxing the bill in the first instance ourselves we should not have allowed these three witnesses, but as they have been allowed we cannot interfere with the decision of the Registrar unless there was no evidence at all before him. That does not appear to me to be the case. In these circumstances the appeal from Bennett J. must be allowed and the review of the taxation of the Registrar must be restored, and his decision upheld; that will be on the terms that the respondents pay the costs both here and below.

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(1) [1927] W. N. 30.

LAWRENCE L.J. I agree. Two distinct questions arise on the taxation of the plaintiff's bill of costs. The first relates to certain costs incurred by the plaintiff before action brought. The second relates to costs incurred by the plaintiff in the action in respect of a third expert. The action was compromised before trial and the order directed the defendants to pay the costs of the plaintiff as between solicitor and client.

It is clear that Order LXV., r. 27, sub-r. 29, gives the Taxing Master a very wide discretion: "On every taxation the Taxing Master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice." The real question on this appeal therefore is whether the Court ought to interfere with the conclusion reached by the Taxing Officer that the costs incurred before action and the costs of the third expert were costs which would have been "necessary or proper for the attainment of justice" if the action had proceeded to trial. It is well established that the Court will not interfere with the discretion of the Taxing Master unless it is shown that he has gone wrong on some question of principle. Mr. Stenham, in a concise and able argument, contended that the only costs before action which could properly be allowed in any case were costs incurred for the purpose of obtaining evidence to be used in the action, and that all costs incurred for the purpose of obtaining advice whether an action should

C. A.
1930
FRANKENBURG
v.
FAMOUS LASKY FILM SERVICE, LD.
Lawrence L.J.

be brought must in every case be rigorously excluded. In my judgment, if the Court were to lay down any such hard and fast rule it would be unduly fettering the discretion of the Taxing Master. *Bright's Trustee* v. *Sellar* (1) and the *Pêcheries Ostendaises* case (2) show conclusively that some costs before action may be allowed, provided that they were necessary or proper for the attainment of justice. The *Pêcheries Ostendaises* case (2) furnishes a useful example of costs before action, which are proper to be allowed. The Master of the Rolls there says (3): "If the costs are in respect of materials ultimately proving of use and service in the action, the Master has a discretion to allow these costs." Applying that principle to the present case, it is for the Taxing Master to form an opinion whether the costs incurred by the plaintiff before action brought were costs of obtaining such materials as would have been of use and service at the trial of the action, if it had not been stayed.

Coming now to the facts in this case: the plaintiff was in occupation of a house the enjoyment of which he feared would be interfered with by the erection of a building in close proximity to it: he thereupon consulted his solicitors and an expert with a view to obtaining legal advice and of ascertaining how the new building would affect his ancient lights: he obtained plans and advice from the architect and surveyor and ultimately brought this action. I can well conceive that some of the materials which he thus obtained before action, although their immediate purpose was to see whether he should commence an action, would have been of use and service in the action if it had come to trial, and in my judgment the Taxing Master would be justified in allowing the costs of obtaining those materials as costs properly incurred for the attainment of justice within the rule. But that is only one example of the kind of costs before action which are proper to be allowed. There may be, and probably are, other costs before action which may properly be allowed. It is a matter of discretion for the Taxing

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(1) [1904] 1 Ch. 369.
(2) [1928] 1 K. B. 750.
(3) [1928] 1 K. B. 757.

Master, whose duty it is to consider the facts in each case and to allow all such costs as in his opinion have been properly incurred before action in obtaining materials which will be useful to the plaintiff at the trial. In the present case Bennett J. has drawn the line at August 15, that is to say, three or four weeks before the action was commenced. Personally I see no ground for limiting the costs before action to that date. The Taxing Master went fully into the matter and is the best judge as to which of the costs incurred before the action were proper to be allowed for the attainment of justice. The Taxing Master seems to me to have properly exercised his discretion in the present case, and the exercise of that discretion ought not to be interfered with by the Court.

The second point, the allowance of the cost of employing a third expert, stands on a somewhat different footing. Tomlin J., as he then was, in the *Graigola* case (1) said that he laid it down as a rule to guide himself in future cases that he would not hear more than two expert witnesses in cases where expert evidence was required, unless there were special circumstances. That seems to me to be an admirable working rule, and I am glad to hear from Mr. Stenham that it has been adopted by the other Chancery judges. But after all it is only a general rule to be followed by each judge at his discretion. Moreover it is frequently difficult at the commencement of an action to foretell whether special circumstances will or will not arise which would induce the learned judge at the trial to make an exception to the rule. In the present case the Taxing Master has had a difficult task to perform, as he has had to judge whether or not if the case had proceeded to trial the judge would have allowed a third expert witness to be called. It is clear that the Taxing Master's attention was called to the rule and that he gave due weight to it; he therefore has not misdirected himself on any question of principle, but has, after careful investigation of the facts, satisfied himself that there were special circumstances which would have induced the trial judge

(1) [1927] W. N. 30.

C. A.
1930
FRANKENBURG
v.
FAMOUS LASKY FILM SERVICE, LD.
Lawrence L.J.

to make an exception and to hear the evidence of a third expert witness. In my opinion this was a matter upon which the Taxing Master could properly exercise his discretion. It must not be lost sight of that the taxation was one as between solicitor and client, and that the Court has not the same opportunity of going fully into the details as the Taxing Master.

In the circumstances I agree with the Master of the Rolls that the summons to vary the Taxing Master's certificate ought to have been dismissed with costs and that this appeal ought to be allowed, with costs.

SLESSER L.J. I agree with my Lords and have nothing to add.

Appeal allowed.

Solicitors for appellant: *Grundy, Kershaw, Samson & Co., London and Manchester.*

Solicitors for respondents: *Kerly, Sons & Karuth, for Marco Blumberg, Manchester.*

W. I. C.

In re LITTLEWOOD.

CLARK *v.* LITTLEWOOD.

[1929. L. 2531.]

MAUGHAM
J.

1930
Oct. 21,
22, 23.

Will—Construction—Specific Bequests charged with Debts and Funeral and Testamentary Expenses—Gift of Residue—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Schedule I., Part II., pars.* 2, 3, 4, 8.

Considered. In re MELDRUM, DECD. [1952] 1 Ch. 208

In a will executed before 1926, an express charge of debts and funeral and testamentary expenses upon specific bequests was followed by an absolute gift of residue. On a summons to determine whether debts and funeral and testamentary expenses were payable primarily out of the bequests or out of the residue:—

Held, that where a will (and a fortiori a will executed before 1926) indicates with reasonable clearness the intention of the deceased, Part II. of Schedule I. to the Administration of Estates Act, 1925, is to take effect subject to any variation required to carry out that intention.

In re Kempthorne [1930] 1 Ch. 268 and *In re Atkinson* [1930] 1 Ch. 47 followed.

In re Smith [1913] 2 Ch. 216 referred to.

SUMMONS.

By her will, dated December 7, 1925, Hannah Littlewood (hereinafter called "the testatrix") gave and bequeathed "all my farm stock, implements and tenant right, but charged with the payment of all my just debts and funeral and testamentary expenses, and also with the payment thereout of the legacies mentioned in the will of my late husband William Littlewood, and an additional legacy of 50*l.* which I bequeath to my stepdaughter Eleanor Booth, unto and equally between my stepson George Littlewood and my son Fred Littlewood": and the will contained also a gift of the testatrix's residuary estate to Frederick Littlewood absolutely.

The testatrix died on February 8, 1929, and this summons was taken out by her executors for the determination (inter alia) of the question whether her debts and funeral and testamentary expenses were payable primarily out of the moneys representing her farm stock, implements, and tenant right, or out of her residuary estate.

Wilfrid M. Hunt for the summons.

A. Guest Mathews for the defendant Frederick Littlewood. In *In re Atkinson* (1) Clauson J. held that in construing the will in that case regard must be had to the law in force at the time of its execution. Sect. 34, sub-s. 3, of the Administration of Estates Act, 1925, becomes applicable. (2) In that case the provisions of the will were held to alter the order laid down in the Schedule by bringing the area of property charged with the debts into the first place. "Residue" in a will usually means the amount coming to a residuary legatee after payment of debts and legacies, so that there is a distinction there. The Schedule is dealing in fact with assets. The present case, so far as the will is concerned, is on all fours with *In re Atkinson.* (1)

J. V. Nesbitt for the defendant George Littlewood. This case is really covered by *In re Kempthorne.* (3) If the order of application of assets as set out in Part II. of Schedule I. to the Administration of Estates Act is not pars. 2, 3, and 4 in the present case, it is almost impossible to imagine a case in which that order could apply. (4) It really becomes necessary now for a testator to say, when he leaves property for appropriation for payment of debts, "in exoneration of my residuary estate." Lord Hanworth M.R. held (3) that those paragraphs in the Schedule do not apply to a gift of residue. It is clearly indicated that, in a case like the present, that order would be applicable.

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(1) [1930] 1 Ch. 47.

(2) Sect. 34, sub-s. 3: "Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II. of the First Schedule to this Act."

(3) [1930] 1 Ch. 268, 296.

(4) Par. 2: "Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid."

Par. 3: "Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts."

Par. 4: "Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts."

MAUGHAM J.
1930
LITTLEWOOD, *In re.*
CLARK *v.* LITTLEWOOD.

Norman Daynes for two other defendants.

MAUGHAM J. This is a puzzling case, and I must endeavour to express my view, regard being had to the judgment of the Court of Appeal in *In re Kempthorne* (1) and to that of Clauson J. in *In re Atkinson.* (2) The point arises under the will of Hannah Littlewood, who died on February 8, 1929, leaving a will dated December 7, 1925, and therefore made before the coming into force of the Administration of Estates Act, 1925. I think that I may therefore follow the view expressed in *In re Atkinson* (2) of Clauson J., who began by saying that although the testator in that case "died after the commencement of the Administration of Estates Act, 1925, with the consequence that in administering his estate the provisions of that Act relating to the order of the application of his assets must be applied, yet in construing the will regard must be had to the law in force at the time of its execution, that is, before the alterations in the existing law were made by the new Act." [His Lordship then stated the material provisions of the will as set out above, and continued :] The true construction of that will and the order in which the assets of the testatrix would have been applied before the coming into force of the Administration of Estates Act, 1925, are admittedly not in doubt. There are a number of authorities showing that when there is a charge of debts created by a will on real estate and a residuary gift is contained in the will, the provision as to the charge on real estate does not discharge the personalty : in order to exonerate the personalty the intention of the testator to do so must be shown to arise from "necessary implication" or "evident demonstration." But if a testator chooses to charge debts by his will on certain specific items of personal estate, and then gives his residue to some person other than the legatee of the specific property, there can be no doubt, on the construction of his will, that he intends the specific property to be primarily applied in payment of the debts, to the exoneration of the

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(1) [1930] 1 Ch. 268.

(2) [1930] 1 Ch. 47.

MAUGHAM J.
1930
LITTLEWOOD, *In re.*
CLARK *v.* LITTLEWOOD.

person to whom the residue is given: *In re Smith.* (1) Accordingly, in my view, the testatrix in this case intended to give to George Littlewood and Frederick Littlewood her farm stock, implements, and tenant right, after payment thereout of all just debts and funeral and testamentary expenses and the legacies therein mentioned and therein bequeathed: and to the residuary legatee Frederick Littlewood she intended to give the whole of the rest of the real estate, discharged from the payment of debts and legacies, provided that the specific gift of farm stock, implements, and tenant right was of sufficient value to discharge the liabilities.

I have now to consider the effect of Part II. of Schedule I. to the Administration of Estates Act, 1925, having regard to the authorities and also to the provisions of s. 34, sub-s. 3, of the Act, and para. 8 of Part II. of Schedule I., which provides that "the order of application may be varied by the will of the deceased." In *In re Kempthorne* (2) I endeavoured to explain the difficulty which I felt in giving effect to some of the provisions of that part of that Schedule, and I understand that the Court of Appeal, who differed from me on one point in that case, also felt some difficulty in explaining the precise effect of those provisions. I think, however, that I am justified in taking the view that, prima facie, the paragraphs of the Schedule are to have effect subject to the provisions of the will of the deceased, in cases where there is a reasonably clear indication of the intention of the deceased: and a fortiori, I think, is that the case where the will was executed before the coming into force of the Administration of Estates Act, 1925.

In the present case I have come to the conclusion that the testatrix has definitely expressed a desire that the debts and funeral and testamentary expenses and legacies shall be paid out of or charged upon the farm stock, implements, and tenant right of which she has disposed: and, following the principle adopted by the Court of Appeal in *In re Kempthorne* (3) and by Clauson J. in *In re Atkinson* (4), I

(1) [1913] 2 Ch. 216.
(2) [1930] 1 Ch. 268, 278.
(3) [1930] 1 Ch. 268.
(4) [1930] 1 Ch. 47.

hold that the order of application of assets specified in Part II. of Schedule I. to the Administration of Estates Act, 1925, has been varied by the provisions in the will of the testatrix, and that the farm stock, implements, and tenant right are primarily applicable for the payment of debts, funeral and testamentary expenses, and legacies.

Solicitors: *Jaques & Co., for E. S. Spencer, East Retford; Torr & Co., for Oxley & Coward, Rotherham.*

K. R. A. H.

In re PREVITÈ.

STURGES *v.* PREVITÈ.

[1930. P. 2668.]

LUXMOORE J.
1930
Dec. 17, 18.

Will—Construction—Statutory Will Forms, 1925—Bequest of pecuniary Legacies—Devise of Freehold House—Gift of all Legacies free from all Death Duties — Residuary Devise and Bequest — Incidence of Estate Duty—Whether borne by Residue or by Freehold House.

A testator by his will, after making specific and pecuniary bequests, gave to his wife absolutely any freehold or leasehold house belonging to him and in which he should be residing at his death. He declared that all legacies thereby given should be free of all death duties and devised and bequeathed all his residuary real and personal estate to his trustees, and declared that (inter alia) Form 8 of the Statutory Will Forms, 1925, should be incorporated in his will so far as it was applicable to his residuary estate. The only real estate the testator possessed at the time of his death was a freehold house in which he was then residing. Questions arose: (1.) whether having regard to Form 8, cl. 4 (*c*), of the Statutory Will Forms, 1925, the estate duty payable in respect of the testator's freehold house on his death should be borne by the testator's widow or by the residuary estate, and (2.) whether upon the true construction of the will, the estate and succession duties payable by reason of the testator's death in respect of the freehold house were payable out of the residuary estate:—

Held, that although the executor was by reason of the provisions of the Law of Property Act, 1925, s. 16, now accountable for estate duty on realty, the incidence of the duty remained unchanged and was still charged by virtue of the Finance Act, 1894, s. 9, sub-s. 1, on the realty in respect of which it was paid. Form 8, cl. 4 (*c*), therefore had no application, and apart from the question of construction the estate duty on the freehold house must be borne by the widow.

LUXMOORE J.

1930

PREVITÈ, *In re.*

STURGES *v.* PREVITÈ.

Held, however, that on the true construction of the will the testator had used the word "legacies" not in its strict sense, but as including the gift of the house in which he was residing at his death, although that house was of freehold tenure. The estate and succession duties payable by reason of the testator's death in respect of the freehold house in question were therefore properly payable out of the residuary estate.

ORIGINATING SUMMONS.

By his will dated November 4, 1926, Henry Francis Previtè (hereinafter called "the testator"), after appointing the plaintiffs his executors and trustees, and after making certain gifts therein mentioned declared by clause 5 that the Statutory Will Forms, 1925, Part I., Forms 1 and 2, should be incorporated in his will. The testator, after a further bequest of personal chattels and a sum therein mentioned to his wife, by clause 7 declared as follows: "I bequeath the following pecuniary legacies—namely," (here were set out the various sums given to certain named legatees). By clause 8 the testator gave the sum of 100*l.* to each of his seven god-children therein named and declared, "I authorize my trustees to invest the legacy of any god-child who may be a minor at the date of my death and I declare that each such legacy shall carry interest at the rate of 5 per cent. per annum until investment or payment."

The will contained the following further clauses: clause 9 "I give to my said wife absolutely any freehold or leasehold house belonging to me and in which I shall be residing at my death together with the land gardens outbuildings and appurtenances thereto belonging or usually held or enjoyed therewith"; clause 10, "I declare that all legacies hereby given shall be free of all death duties"; clause 11, "I devise, and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees and declare that Forms 8 and 10 of the said forms are incorporated in my will so far as they are applicable to my residuary estate"; clause 12, "Subject as aforesaid my trustees shall hold my real and personal estate upon trust for my nephews and nieces corresponding with the trust in favour of a child or children set out in section 2 of Form 10 of the said forms."

The testator died on December 31, 1929, and his will was proved by the plaintiffs on March 5, 1930, in the Principal Probate Registry. His wife survived him. At the time of his death the testator was living in a freehold house, No. 61 Catherine Street, Buckingham Gate. This was the only real estate he possessed.

A question having arisen whether the estate duty and succession duty payable in respect of the freehold house should be borne by the widow of the testator, a defendant to the summons, or whether these duties or either of them were properly payable out of the residuary estate; the plaintiffs took out an originating summons for the purpose of determining this question.

A. Adams for the plaintiffs.

J. W. Manning K.C. and *J. N. Gray* for the first defendant, the widow of the testator. The estate duty payable in respect of the freehold house should be borne by the residue. Form 8, cl. 4 (*c*), of the Statutory Will Forms, 1925, which are in part incorporated in the testator's will, is relied on. (1) First, the estate duty is one payable out of capital on the death and is borne by the corpus. The incorporation of this particular form relieves this freehold house from the liability to estate duty. It is admitted the form is of no assistance regarding the payment of succession duty. Secondly, this gift of the house is a "legacy" within clause 9 of the will, and by clause 10 all legacies are declared free of duty: Jarman on Wills, 7th ed., vol. iii., p. 1795.

W. P. Spens K.C. and *C. E. Harman* for the last three defendants, children of a brother of the testator and claiming to be beneficially interested.

There is nothing in the recent legislation to alter the incidence of estate duty: see the Administration of Estates Act, 1925, s. 53, sub-s. 3. On the first point, the Statutory Will Forms do not assist the contention put forward on behalf of the testator's widow: Finance Act, 1894, s. 9, sub-s. 1; and *In re Sharman.* (1)

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(1) Statutory Will Forms, 1925, Form 8, cl. 4 (*c*): [Trustees to provide out of residue for] "The duties, payable out of capital on any death, and not charged on or primarily payable out of other property." The forms are reprinted in W. N. 1925, Part ii., 298.

[LUXMOORE J. referred to *In re Hudson.* (2)]

The property does not pass to the executor as such and therefore bears its own estate duty.

For the executor's powers in regard to the payment of estate duty, see the Finance Act, 1894, s. 6, sub-s. 2; and also Law of Property Act, 1925, s. 16, sub-s. 1. There is nothing to release the specifically devised property from the charge under the Finance Act, 1894, s. 9, sub-s. 1.

As to the second contention, the word "legacies" here must refer to the personalty and cannot include a freehold house: *Windus* v. *Windus* (3), where the cases are discussed. *Ellard* v. *Phelan.* (4) The terms used in the will are proper technical terms.

J. W. Manning K.C. in reply referred to *Brady* v. *Cubitt* (5) on the question of a legacy signifying in some cases a devise of land.

LUXMOORE J. The question to be determined is whether upon the true construction of the testator's will the estate duty and succession duty payable on his death in respect of the freehold house, No. 61 Catherine Street, Buckingham Gate, Westminster, or either and which of those duties is payable out of his residuary estate. The question is one of construction. The will is dated November 4, 1926, and it is remarkable in this sense, that this is, so far as I am aware, the first will which has been before the Court incorporating any of the Statutory Will Forms, 1925, prescribed under the provisions of s. 179 of the Law of Property Act, 1925. [His Lordship read the material clauses of the will set out above.]

By clause 11 he devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees and declared that Forms 8 and 10 of the said forms —that is the Statutory Will Forms, 1925—were to be incorporated in his will so far as they were applicable to his residuary estate. Now Statutory Form 8 provides: "Any property disposed of by my will (otherwise than in exercise of a special power) to which this clause is applied shall be subject to the following provisions." Then follow certain provisions with regard to: (1.) real property, including chattels real being held upon trust for sale and personal property being held upon trust for sale and conversion; (2.) the trustees are to have power to postpone the sale, and (3.) the reversionary interest shall not be sold until it falls into possession. Then (4.) the trustees out of the net moneys which arise from the sale and conversion of the property are to pay and provide for: (*a*) the funeral and testamentary expenses, and (*b*) debts, except charges upon other property. Then comes the important sub-clause: (*c*) "The duties, payable out of capital on my death, and not charged on or primarily payable out of other property." That is the material clause. On that Mr. Manning claims that the duties payable in respect of the freehold property are directed to be paid out of the residuary estate. Form 10 I think is immaterial so far as the question I have to determine is concerned.

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(1) [1901] 2 Ch. 280.

(2) [1911] 1 Ch. 206.

(3) (1856) 6 D. M. & G. 549, 557, 559.

(4) [1914] 1 I. R. 76.

(5) (1778) 1 Doug. 31, 39.

At the time of the testator's death he was living in a freehold house, 61 Catherine Street, Buckingham Gate, and the question which I have to determine is: are the death duties, that is the estate duty and succession duty, payable out of this freehold house or are they payable out of the testator's residuary estate, or each or either of them?

Mr. Manning, for the widow, claims that they are payable out of the residuary estate on two grounds. First, he says, the death duty is payable out of the residuary estate by reason of the provisions of Form 8, cl. 4 (*c*), of the Statutory Will Forms, 1925. He says that estate duty is a duty payable out of capital on the testator's death, and that it is not charged on or primarily payable out of property other than the residue. He admits that he cannot bring succession duty under that provision. Is his contention right with regard to estate duty?

LUXMOORE J.
1930
PREVITÈ, *In re.*
STURGES *v.* PREVITÈ.

By the Finance Act, 1894, s. 6, sub-s. 2, it is provided that the executor is bound to pay all the estate duty in respect of personal property, but so far as the realty is concerned he is only authorized to do so. In other words an executor though empowered to pay the duty in respect of realty is not bound to pay it and can obtain probate without doing so. By s. 8, sub-s. 3, of the same Act, the executor is made accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but there is no such responsibility imposed on him in respect of the testator's real estate. By s. 9, sub-s. 1, it is provided: " A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable . . . ." It was decided on those sections that estate duty payable in respect of real estate was not a testamentary expense of a testator who died after the coming into force of the Land Transfer Act, 1897, and who gave a direction for the payment of his debts, funeral and testamentary expenses out of his residuary personal estate: *In re Sharman.* (1) In other words it was held that s. 9, sub-s. 1, must be construed in accordance with the law as it stood before the passing of the Land Transfer Act, 1897, and not in accordance with the provisions of that Act.

By the Law of Property Act, 1925, s. 16, sub-s. 1, it is provided: " A personal representative shall be accountable for all death duties which may become leviable or payable on the death of the deceased in respect of land (including settled land) which devolves upon him by virtue of any statute or otherwise." By sub-s. 5 it is provided as follows. (2) [His Lordship read the sub-section.]

(1) [1901] 2 Ch. 280.

(2) Law of Property Act, 1925, s. 16, sub-s. 5: " Notwithstanding that any duties are by this section made payable by the personal representative or other person aforesaid, nothing in this Part of this Act shall affect the liability of the persons beneficially interested or their respective interests in respect of any duty and they shall accordingly account for or repay the same and any interest and costs attributable thereto to the said Commissioners or to the personal representative or other person accountable as aforesaid, as the case may require."

The result is that though the executor is now made accountable for the estate duty, the incidence of the duty is not changed and any duty paid still remains charged by virtue of the Finance Act, 1894, s. 9, sub-s. 1, on the realty in respect of which it was paid. It follows therefore that so far as the rateable part of the estate duty in the case before me is concerned, it is still charged on 61 Catherine Street, and cl. 4 (*c*) of Form 8 of the Statutory Will Forms, 1925, does not apply. Mr. Manning's first point consequently fails.

For his second ground he relies on clause 9 of the will and says that the gift to the testator's widow was the house in which he might be residing at his death, and therefore that what is contained in clause 9 is a legacy within the meaning of clause 10. Clause 10 provides that all legacies thereby given shall be free of all death duties. Of course, " legacy " is a word of art, and apart from any context its strict meaning confines its application to gifts of personalty, but like any other word it has a flexible meaning and yields to a sufficient context so as to include a gift of realty. Is there any such context here ? The will is obviously what may be properly described as a lawyer's will. It refers to pecuniary legacies, using the word in its strict sense, and when it comes to the residuary clause the appropriate words " devise and bequeath " are used. It is however I think to be observed that the object of clause 9 is to give the widow the house in which the testator was residing at his death. It was realized I think that it might be of freehold or leasehold tenure, for the fact is stated in the clause in question. The colourless word " give " is used, not the word " devise " or " bequeath." It is admitted that if the house was in fact of leasehold tenure then on the strict interpretation the gift would properly be described as a legacy. In the circumstances it would certainly seem to me to be capricious for a testator to give the house free from death duties if it were leasehold, but to leave the donee subject to death duties if it were freehold. The clause as to freedom from death duties follows immediately after this gift, and all the provisions relating to

LUXMOORE J.
1930
PREVITÈ, *In re.*
STURGES *v.* PREVITÈ.

the disposition of the testator's estate which follow that clause relate to residue.

On the whole I have come to the conclusion that as a matter of construction the testator has, in using the word "legacies," in fact shown the intention of using it as a description of all the gifts contained in the clauses which precede the clause as to freedom from death duties.

I am satisfied there is sufficient context for me to hold as a matter of construction that the word "legacies" in clause 10 includes the gift of the house in clause 9, and I therefore hold that both the estate duty and succession duty in respect of this house are properly payable out of the testator's residuary estate.

Solicitors: *William Sturges & Co.*; *Janson, Cobb, Pearson & Co.*

A. R. T.

WATSON v. DAVIES.

MAUGHAM J.

1930

Nov. 26, 27; Dec. 11.

[1930. W. 385.]

Vendor and Purchaser—Letter from Vendor to Secretary to Charity stating Price of Property—Interview between Deputation from Board of Management and Vendor—Acceptance at Interview of Vendor's Offer subject to Ratification—Negotiations broken off by Vendor before Ratification—Acceptance by Agent subject to Ratification by Principal.

The plaintiff was chairman of the board of management of a charity. The defendant wrote a letter to the board saying that he would sell certain property to the board for 6500*l.* At a full meeting of the board instructions were given to arrange for an inspection of the property by members of the board on a specified date. A deputation, consisting of the plaintiff and twelve other members of the board, viewed the property and had an interview with the defendant. The price of 6500*l.* was again mentioned, and the defendant was told that all the members of the board present had resolved to buy the property, and that they could carry the necessary resolution, and they purported to accept the defendant's offer subject to a formal meeting. The secretary of the charity stated that the deputation was not a quorum and could not act as a properly constituted board. On the next day the defendant wrote to the secretary promising that the deeds of the property should be left to be inspected by the solicitor to the charity, and that his own solicitor would forward a form of contract; and the secretary thereupon sent out a notice to members of the board of a special meeting to be held two days later "to receive the report and recommendation of the deputation." On the day of that meeting the defendant telegraphed to the secretary cancelling all negotiations. The meeting, however, passed resolutions to ratify the deputation's acceptance of the defendant's offer to sell for 6500*l.*, and to instruct the solicitor to the charity to require the defendant to complete. In an action by the plaintiff on behalf of himself and of all other members of the board for specific performance of an agreement to sell the property to the charity for 6500*l.*:—

Held, (i.) that on the facts the members of the deputation did not warrant their authority to bind the board, and that their acceptance of the defendant's offer was subject to ratification by the board;

(ii.) that where an offer is accepted by an agent subject to ratification by the principal there is no contract or contractual relation until ratification, and at any time before ratification the offer may be withdrawn.

Bolton Partners v. *Lambert* (1889) 41 Ch. D. 295 discussed and distinguished.

Observations as to proof of verbal acceptances of offers in writing to sell real estate.

ACTION.

The following statement of the facts and of findings as to fact is taken from his Lordship's considered judgment :—

In this case the plaintiff John Mathewson Watson, suing on behalf of the board of management of Henshaw's Institution for the Blind, is claiming specific performance of an agreement for the sale of a house and premises known as Colet House situate at Rhyl. It may be desirable first to say that Henshaw's Institution for the Blind is a Manchester charity regulated under a scheme approved by the Charity Commissioners in the year 1924 as modified by an Order dated June 22, 1928. The charity and the endowments thereof under clause 1 of the scheme must be administered and managed by the board of management for the time being of the charity, who are the trustees of the charity. Under clause 14 the board of management consists of nominated members and representative members, and the scheme provides for their nomination and appointment. By clause 24 it is provided that the members may at any time be summoned by the chairman or any two members of the board upon four days' notice being given to all the other members of the matters to be discussed. The quorum is five members present at a meeting (clause 25). By clause 26 it is provided that every matter shall be determined by the majority of votes of the members of the board present and voting on the question ; and the chairman is given a casting vote.

The defendant, who carries on business at Rhyl, had acquired in the year 1929 Colet House and some neighbouring land which had been till recently used as a school. He had sold part of the premises—namely, the part which had been used as a kitchen garden, for 1000*l.* ; and he had also sold some land and foreshore to the north of the East Parade, which was the principal frontage to Colet House. In December, 1929, being desirous of selling Colet House, he was placed in touch with Mr. Watson, the plaintiff, who was the chairman of the board of management of the charity and a gentleman well known in Manchester, which is the headquarters of the charity. Mr. Watson and Mr. Bannister, who is the director and secretary of the charity, called at Rhyl on January 1, 1930, by appointment, after some preliminary correspondence, and they went over the property. The defendant produced the plans of the property and showed on the block plan the premises which he was proposing to sell, including Colet House and lawn; but he was told that the charity would require the adjoining premises, Games Field, to the east of Colet House. Games Field included a building called Stone Lodge at the north-east corner, and upon consideration the defendant agreed to include this with Colet House. There is a door between Colet House and Games Field, and the field had obviously been used together with Colet House when the premises were occupied as a college for boys. The defendant expressed his delight that the proposal was for a purchase by the charity for the benefit of the blind, and stated that he had always been deeply interested in this branch of charitable activity. He did not then fix a price, but stated that he would consider the matter and would sell the property at a price which would give him no profit. He thought that would be about 6600*l.* He also said that some other people, the Yorkshire Miners' Welfare Committee, were after the property. Nothing was settled on that occasion, but Mr. Watson and Mr. Bannister returned to Manchester determined to recommend the purchase to the board of management. On January 2 the defendant wrote a letter to Mr. Bannister pointing out the advantages of the property from the special point of view of the charity, and on January 3 he was informed that a sub-committee had been called together for the following Monday to consider the matter. On January 7, 1930, the defendant wrote a letter in the following terms to Mr. Bannister on behalf of the charity: "Dear Mr. Bannister,—Thanks for your letter and I trust the project may commend itself to your board. Should you decide to come to Rhyl and would consider the suggestion to use the Stone Lodge on promenade as a depot for sale of goods made by the blind, I am confident a very substantial revenue would accrue. Holiday people are generally speaking sympathetic especially in the cause of the blind—and the position is such that all passers by would be subjected to a silent appeal—at all times—so that it could not fail to yield a handsome contribution to the institution expenses. The inclusive price of the property including all fittings, linos, loose furniture, electrical equipment in house and laundry would be 6500*l.* The quietude of the grounds and the traffic side road and entrance are features which seem particularly helpful in ensuring maximum safety for the inmates. The Yorkshire Miners' Welfare Committee postponed their inspection until 1.45 next Saturday—and if you arrive at a definite decision before then I shall be glad to know.—Yours faithfully, R. L. Davies." This letter is the letter relied upon by the plaintiff as constituting a sufficient memorandum to satisfy s. 40 of the Law of Property Act, 1925.

The sub-committee meeting was held, and on January 9 there was a full meeting of the board of management, at which Mr. Watson reported the visit of himself and Mr. Bannister to Colet House and reported upon the suitability of the premises for the purpose of new homes for the charity. The letter of January 7 was submitted and read and was described as stating that Mr. R. L. Davies was prepared to offer the premises and the adjoining land to the institution for the sum of 6500*l.* The minutes of the meeting continued as follows: "It was thought that all members of the board of management should be afforded an opportunity of viewing the premises and, as an early visit was essential, owing to the likelihood of purchase by another organization, instructions were given to arrange for an inspection of Colet House by members of the board on Saturday, January 11, 1930. It was moved by Councillor Ackroyd, seconded by Councillor Stott and resolved: 'That if, in the opinion of the deputation, Colet House is considered suitable, before purchase is agreed upon the services of a surveyor and architect be engaged to make a thorough investigation into the condition of the premises.'"

Accordingly, on Saturday, January 11, Mr. Watson and twelve other members of the board in addition to Mr. Bannister travelled by appointment to Rhyl, where they were met by the defendant and were shown over the property—namely, Colet House and lawn and the adjoining Games Field. They knew that the kitchen garden had already been sold, and there never has arisen any question as to what property was the subject-matter of the letter of January 7 from the defendant, nor as to the price mentioned in that letter, a price that was repeated on January 11. The defendant stated again that other people were after the property and in fact were due to arrive at the property for the purpose of an inspection at 1.45 that day, and he repeated what he had said in his letter of January 7, that it was extremely desirable that the deputation (a word which I will use to describe those members of the board of management who were visiting Rhyl) should make up their minds definitely on the proposal. It was with this knowledge that the deputation went together with the defendant to lunch at the Queen's Hotel, where a big table had been reserved. Mr. Watson called upon Mr. Davies to address the members of the board, and he made a speech lasting some ten minutes expressing once more his delight at the thought that the premises might be used for such admirable purposes. One of the members of the board present, Mr. Dewhurst, asked for an assurance as to the state of repair of the premises and that they were free from dry-rot, and Mr. Davies was able to reassure the deputation on that point and also on the point of the drains, which he said were in good order. He was then asked to retire, and after some ten minutes or so, during which time the members of the deputation came to a unanimous view, the defendant was recalled.

I pause here to say that there has been an acute conflict of evidence between the witnesses called on behalf of the plaintiff and the defendant as to what took place after lunch on this occasion. Three witnesses were called on behalf of the plaintiff—namely, Mr. Watson, Mr. Bannister and Mr. Meachin, who was one of the deputation. According to Mr. Bannister, Mr. Watson and Mr. Meachin, Mr. Watson at once told Mr. Davies, when he returned to the room, that his offer was accepted; and in order to show that that was the unanimous decision of the members of the board who were present he called upon the members in favour of accepting the offer of Mr. Davies to hold up their hands, and they all did so in the presence of Mr. Davies. They testify that Mr. Davies said with great pleasure: "It is yours, you can have it," and again: "I am delighted that you have bought it, as it is just the place for the blind." According to their evidence nothing whatever was said about a written contract on that occasion, nor as to an option, nor as to anything being signed by the members of the board who were then present. Every one, however, seems to have anticipated that there would be a written contract, and it was arranged that Mr. Davies should bring the deeds to Manchester on the following Tuesday, when there would be a meeting of the board of management and a deposit paid if desired. One of the members present, Mr. Stott, asked Mr. Davies if he would like a deposit then; but Mr. Davies said that in the circumstances it was not at all necessary. I should add that the meeting was arranged for the Tuesday instead of the Monday, according to the recollection of the plaintiff's witnesses, at the request of Mr. Davies, who said he would be in Manchester on that day. Mr. Watson says that after Mr. Davies had been informed that the board had agreed to accept his offer of the property for 6500*l*., he said: "We will call a meeting to ratify this decision and receive the deposit." I mention this, because the word "ratify" may have some importance in connection with the true view of what took place on this occasion. Mr. Meachin's recollection is that on the return of Mr. Davies, Mr. Watson informed him that the members of the board there present, who were a majority of the board, had unanimously decided to purchase the property at the price stated, 6500*l*.

Mr. Davies' evidence up to a point is in agreement with the evidence on behalf of the plaintiff; but when he returned to the room at the hotel he says that Mr. Watson said to him: "Well, Mr. Davies, there are 14 out of 18 members of the board present, and those that are here are unanimously in favour of purchasing," and then he says what happened was as follows: "I said: 'I see. I shall want a contract and I have made my arrangements with my solicitor to be available'—it was a Saturday afternoon—'and I can get on the 'phone to him to his private house.' Mr. Bannister then said: 'You cannot do that.' He said: 'This is not a committee.' Mr. Watson said: 'Cannot we form ourselves into a committee?' and Mr. Bannister rose from his seat and said: 'No, you cannot do that. This is not a properly constituted meeting of the board: you have many obstacles to surmount, and you had better get Mr. Davies to give you an option for a few days.' I said: 'Well, I am not prepared to give an option.' Mr. Watson then said: 'But, surely, you can take our word? I will take a vote in your presence.' He took a vote, and he said: 'Any dissentients?' and they said 'No,' and there were no dissentients." Mr. Davies then says as follows: "I said: 'I am not prepared to accept that. I have people at Colet House now who have been in negotiation for some considerable time. They have gone further into the matter than you have. They have had the property surveyed, and if I let these people go, I should be in a very awkward position.'" If this account is correct, a deadlock had arisen; but the witness was unable to say how the deadlock was surmounted or dealt with. According to the passages of his evidence which I have read and the rest of his evidence his view is that he explained to the members of the deputation that he would be unable to bind himself in any way unless there was a written contract entered into, and that he considered himself free to go back to the other people (a deputation from the Yorkshire Miners' Federation) who were then at Colet House and to enter into a contract with them. However, he goes on to say that Mr. Bannister asked if they could see the deeds and that he replied: "I do not think there will be any objection," and further said he would arrange to go to Manchester and take the deeds for them to see, so that he would be at the meeting and be able to discuss the matter further with the remainder of the board and if possible come to some decision with them. He declares that nothing was said about a deposit at all, and that he had nothing to do with the arranging of the precise time and date of the meeting and did not suggest the Monday. He further says that he entered into conversation with Mr. Meachin and another member of the board and asked them whether they thought that the other members of the board would vote for this purchase, and that the reply given him was: "There are queer beggars on this board, but if half of them go back on it we can carry it."

I am quite satisfied that the recollection of the defendant is not in all respects to be relied on; and I was not at all satisfied with some of the answers which he gave in cross-examination. There was no deadlock at all. There was no question of an option being refused. I do not believe that Mr. Davies suggested that a written contract must be entered into forthwith. There was however some evidence given by Mr. Bannister, supported, in my view, by some written records, which has caused me to entertain considerable doubts on the question whether there was an unconditional acceptance of what the deputation regarded (and I think properly regarded) as a definite offer by Mr. Davies. In cross-examination of Mr. Bannister as to what took place after Mr. Davies had been recalled to the room on the 11th, it was put to him that he had said that the board was not properly constituted and he added that the board had a lot of difficulties to surmount. His reply was: "My recollection is making it clear to Mr. Watson that that was not a properly constituted meeting of the board of management. I gave that as my opinion." He was asked why the occasion arose of his saying that the board were not a properly constituted board that afternoon, and his reply was: "It would probably be my own anxiety to safeguard the board of management, to raise technical points that might arise." Then he was asked what technical points arose according to his mind at that time. "(Q.) Did not you want to bind yourselves? Did not you want to bind the board?" and the answer was: "Of course, I was not clear as to the legal position and I did not want the board of management to do anything which would involve them in any way.

(Q.) In other words, you did not want to enter into a concluded contract. Is that true ? (A.) I raised the question. (Q.) Why ? (A.) As I say, in case the board of management did anything as to which they had not express powers." A little later he said : "My opinion at that time was that the members of the board present there did not constitute themselves a regular meeting of the board of management, and whatever powers they may have had as individuals or as members of the board I did not know, but I thought it wise to raise the point." With an anticipation as to what Mr. Davies might say I thought it right to press Mr. Bannister as to the stage at which he raised with Mr. Watson the question whether the members present were a properly constituted board ; but I was unable to get from him anything except that he thought it was raised after Mr. Davies came into the room. I think at any rate that, without relying too much upon Mr. Davies' evidence, I must yet accept the testimony of Mr. Bannister that in Mr. Davies' presence he stated that the members present were not a properly constituted board of management, and this although Mr. Watson has no recollection of this matter being raised.

The subsequent events are as follows : On January 12 Mr. Davies wrote to Mr. Bannister a letter in the following terms : "Dear Mr. Bannister,—I will call at 90 Deansgate shortly after 10 A.M. on Tuesday and will leave the deeds of Colet House, so that your solicitor will have an opportunity of perusing them before your meeting at 2.30. I will also arrange for my solicitor to forward you form of contract to-morrow so that it can be compared with the deeds. I shall have to bring the deeds back here on Tuesday evening, but your solicitors could of course see them again if necessary. I trust you had a comfortable journey back.—Yours sincerely, R. L. Davies." On the same day Mr. Bannister sent out a notice to the members of the board of management stating that their attendance was required at a special meeting to be held on Tuesday the 14th at 2.15 P.M. at the offices of the National Institute for the Blind. It is important to note that the business is described as "To receive report

MAUGHAM J.

1930

WATSON v. DAVIES.

and recommendation of the deputation to Colet House." I may mention here that on Sunday, January 12, Mr. Davies had written to the secretary of the South Yorkshire Miners' Federation a letter as follows: "Dear Sir, re Colet House. Referring to the interview I had with your committee yesterday, I beg to state that if the form of contract with the Manchester people is not completed on Tuesday, I will communicate with you immediately afterwards. I had another party from Preston to see me to-day about acquiring the property.—Yours faithfully, R. L. Davies." From this letter it appears clear that the defendant intended at that time to allow the board of management an opportunity of signing a contract on the Tuesday before dealing with the Miners' Federation; but on the morning of the Tuesday, having obtained a higher offer from them, he sent a telegram to Mr. Bannister in the following terms: "Colet House, Rhyl. Please treat all negotiations between us as cancelled. Property not for sale.—R. L. Davies." The board of management were confronted with this telegram when they met at 2.15 P.M. on January 14. The minutes of that meeting are not challenged as being inaccurate, and I now transcribe them: "Establishment of new homes. Premises at Rhyl—Colet House. The meeting was called to receive the report and recommendation of the deputation to Rhyl. The director read a telegram from the vendor, received at 12.23 P.M. that day, indicating his decision to discontinue negotiations for the sale of Colet House. The chairman reported on the visit of the deputation, which consisted of the majority of members of the board of management, to Rhyl on Saturday, January 11. The deputation were satisfied with the suitability and price of the premises and had undertaken to purchase. It had been agreed with Mr. Davies that the decision to purchase should be formally ratified by a properly constituted meeting of the board of management to be held on Tuesday, January 14, and Mr. Davies had undertaken to regard the property as sold to this institution and to forward the deeds and contract of sale for completion at the board meeting to be held on Tuesday. After discussion and consultation with the institution's solicitor, it was moved by Mr. Wharton, seconded by Mrs. Hampson and unanimously resolved: 'That the action of the members of the board present at Rhyl on January 11 in accepting the offer of Mr. R. L. Davies to sell to this charity, for the sum of 6500*l.*, Colet House, Rhyl, and the accompanying land, be and is hereby confirmed.' It was further moved by Mr. Jarvis, seconded by Mr. Stott and unanimously resolved: 'That the correspondence, plans, etc., in respect of Colet House be handed over to the institution's solicitors with instructions to call upon Mr. Davies to complete the sale of the property for 6500*l.*'" It will be observed that Mr. Bannister in his notice calling the meeting does not say that the business is to approve of the contract which had already been entered into by the board, but that the business is to receive a report and recommendation of the deputation. In the minutes of the meeting of January 14 the statement is that the deputation "had undertaken to purchase"; but that it had been agreed with Mr. Davies that "the decision to purchase should be formally ratified by a properly constituted meeting of the board of management," and that Mr. Davies had "undertaken to regard the property as sold to the institution" and to forward the contract for completion at the board meeting to be held on Tuesday. I should add that when the matter came into the hands of the solicitors for the plaintiff they, by their letter of January 16, 1930, to the defendant's solicitors, stated as follows: "On January 11 fourteen out of the fifteen members of our clients' board of management accompanied by their director inspected the premises and verbally accepted the offer. Your client said that he could not leave the matter open until the next meeting of the board of management. Thereupon our clients explained that there was only one member of the board absent and that the confirmation by the board was a mere formality and at his request they personally warranted their authority to accept the offer on behalf of the charity." I do not think it necessary to point out the inaccuracies in this statement. The point of importance for me is that it impliedly recognizes the necessity for confirmation by the board, and does seem to support the view that Mr. Davies had been informed that the fourteen members of the deputation who attended on January 11 were not a duly constituted board.

In this action the plaintiff claimed on his own behalf and on behalf of all the other members of the board of management specific performance of an agreement for the sale to Henshaw's Institution for the Blind by the defendant of Colet House, Rhyl.

Sir Herbert Cunliffe K.C. and *John Bennett* for the plaintiff. The contract was completed either by what was done on the 11th, or by ratification on the following Saturday. The members of the board who went to Rhyl decided to buy the property without waiting for any investigation by a surveyor. This case is covered by the decision in *Bolton Partners* v. *Lambert*. (1)

Sir Gerald Hurst K.C. and *J. M. Easton* for the defendant. The letter of January 7 is not an offer. It is simply a statement of the lowest price that the defendant would accept. Even assuming that it is an offer, it does not satisfy s. 40 of the Law of Property Act, 1925. If it was an offer it was not accepted before the defendant's telegram of January 14 to the plaintiff. On January 11 there was no acceptance of any offer. The letter must be construed in the light of previous evidence. There was an interview, and the defendant said that the cost would work out at something like 6600*l*. The letter was written with a view to attracting an offer, and the defendant is not precluded from saying that it is not an offer: *Harvey* v. *Facey*. (2) The points distinguishing that case from this do not in any way detract from the relevance of the passage at the end of the judgment: "The mere statement of the lowest price at which a vendor would sell contains no implied contract for sale at that price to the persons making the inquiry." [They referred also to *Boyers & Co.* v. *D. & R. Duke*. (3)] The letter is an intimation to the board that it must decide whether or not it is prepared to make an offer on the basis indicated. A deputation came and said that they would recommend the acceptance. There was nothing in the plaintiff's evidence suggesting a personal warranty of authority. The probabilities are against immediate absolute and unconditional acceptance, and are in favour of the defendant's having said that he must have a contract. The doctrine in *Bolton Partners* v. *Lambert* (1) does not apply where the agent himself states that ratification must be by principals.

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(1) 41 Ch. D. 295.

(2) [1893] A. C. 552, 554, 556.

(3) [1905] 2 Ir. R. 617.

Sir Herbert Cunliffe K.C. in reply. It is quite clear that the only purpose of the adjournment was that there should be a contract, and that it should be settled whether the meeting was in fact able to do what it purported to do. This was not a conditional contract.

Cur. adv. vult.

Dec. 11. MAUGHAM J. [having stated the facts and his findings as to facts as set out above:] In these circumstances, and having regard to the evidence of Mr. Bannister and to the documents which I have referred to, I have come to the conclusion that Mr. Davies was informed that the members of the deputation present on January 11 were not a duly constituted board of management of the charity and were unable at that time to enter into a contract with him binding the trustees of the charity. What I think they did say was that they had all made up their minds to purchase the property, and that the board meeting which was to be summoned for the following Tuesday would be a mere formality, since the members then present could carry the necessary resolution; and I think Mr. Davies was satisfied with this. I cannot find, however, that they warranted their authority to bind the board as a whole, as suggested in the letter of their solicitors; and they certainly did not overrule or disregard the view of Mr. Bannister, which was undoubtedly correct, that the members present had no legal right to bind the board of management at that meeting. On the whole, therefore, I find myself unable to come to the conclusion that the offer

(1) 41 Ch. D. 295.

MAUGHAM J.

1930

WATSON v. DAVIES.

of the defendant contained in the letter of January 7, 1930, was accepted otherwise than subject to ratification on the Tuesday following. I will add two further observations: First, that in a conflict of recollection as to statements made at an interview, considerable weight ought to be attached to contemporaneous writings throwing some light on what in fact occurred. Secondly, that the onus of proving an unconditional verbal acceptance of an offer in writing to sell real estate ought to be regarded as a heavy one, to be discharged only by clear evidence of the fact. In a case of reasonable doubt the Court must take the view that the verbal acceptance has not been established.

On this conclusion as to the facts, the much discussed case of *Bolton Partners* v. *Lambert* (1) does not, in my opinion, apply. Reference to that case will show that the contract was one entered into by a Mr. Scratchley on behalf of a company called Bolton Partners, Ld. He had told the defendant that he would refer the defendant's written offer to his directors, and he had subsequently written to the defendant stating, erroneously, that the directors had accepted the latter's written offer. On the face of the documents there was, therefore, a complete contract, and it was held by the Court of Appeal that the defect arising from the circumstance that Mr. Scratchley had not obtained a proper authority to bind the company could be cured by a ratification, and this even though the defendant, the other party to the bargain, had purported to withdraw his offer. The ratification was held to date back, the maxim applicable being "Omnis ratihabitio retrotrahitur et priori mandato aequiparatur." In a case where the agent for one party to a negotiation informs the other party that he cannot enter into a contract binding his principal except subject to his approval, there is in truth no contract or contractual relation until the approval has been obtained. The agent has incurred no responsibility. In *Bolton Partners* v. *Lambert* (1) the decision of the Court was, I think, founded on the view that there was a contractual relation of some kind which could be turned into a contract

(1) 41 Ch. D. 295.

with the company by a ratification, whilst in the absence of ratification there was a right of action against the agent for breach of warranty of authority. It was admitted that there could be no ratification of a legal nullity. An acceptance by an agent subject in express terms to ratification by his principal is legally a nullity until ratification, and is no more binding on the other party than an unaccepted offer which can, of course, be withdrawn before acceptance.

In my judgment, the action fails on this ground, and I need not deal with the other points raised on behalf of the defendant. On the question of costs, I have had some doubts, but having regard to the view I have taken as to some of the evidence given by the defendant, and to the other facts of the case, I think I shall be doing right in dismissing the action without costs.

Solicitors: *Hickson & Parish, for Slater, Heelis & Co., Manchester; Soames, Edwards & Jones, for Joseph Lloyd & Co., Rhyl.*

K. R. A. H.

FARWELL J.

1931

Jan. 27, 28.

STENING v. ABRAHAMS.

[1929. S. 4129.]

Landlord and Tenant—Lease—Covenants—Not to "part with the possession of the demised premises or any part thereof"—Seven Years' exclusive Licence to erect Advertisement Hoarding against Front Wall.

A lessee's covenant not to "part with the possession of the demised premises or any part thereof" is broken only if the lessee entirely excludes himself from the legal possession of part of the premises.

On the particular facts and documents in the particular case a seven years' exclusive licence to erect an advertisement hoarding against the front wall of the lessee's house followed by its erection was held no breach of the above covenant.

WITNESS ACTION.

By a lease dated February 1, 1922, the plaintiffs' predecessor in title, who carried on an estate agent's business as "Chancellors" in Station Yard, The Quadrant, Richmond, Surrey, let 34 The Quadrant, a few doors off their own offices, to the defendants for twenty-one years from December 25, 1921, at a premium of 300*l*. and a rent of 200*l*.

The defendants covenanted (inter alia):—

"(9.) Not to assign underlet or part with the possession of the demised premises or any part thereof without the previous consent in writing of the lessor. . . . ."

The lessor reserved power to determine this lease at three months' notice in case he or his successors in "Chancellors'" business received a three months' notice to quit from their own landlords, the Southern Railway.

The ground floor of No. 34 was a shop used by the defendants. The first and second floors were long rooms with windows on the Quadrant and at the back.

In 1929 they determined to make some profitable use of the upper part of the house.

By a memorandum dated September 20, 1929, the defendants gave A. A. Sites, Ld., the following licence:—

"We hereby give to A. A. Sites, Ld. (hereinafter called the 'Company'), of 161A Strand . . . . the exclusive right to use for the purpose of suspending fixing and exhibiting advertisement bill-boards, hoardings, or displaying advertisements on our premises from the shop fascia upwards at 34 The Quadrant Richmond Surrey together with free and uninterrupted access to the same with view as at present existing at a rental of 78*l.* per annum inclusive.

"This arrangement shall date from September 29, 1929, and be for a period of 7 years and the Company are to have the option of continuing same for a further period of 5 years and thereafter from year to year until 6 months' notice shall be given expiring on the usual quarter day, provided always that the superior landlords raise no legal objection to this agreement or any part of it.

"The rent shall be payable quarterly in advance, the first of such quarterly payments or proportionate part thereof to be made on the quarter day next following the day of user.

"Provided always that if owing to the action of any authority the exhibition of advertisements is found to be impossible or impracticable, or in the event of this country being engaged in any serious war, or in the event of any civil disturbance, then this arrangement shall be forthwith cancelled. Also if the effective display of any such advertisements shall at any time be obscured, then the said rent shall cease until such obstructions be removed.

"Any materials used shall remain the property of the Company and at the conclusion of this arrangement be removable by them.

"Also provided that the premises are not required by the Landlords who may terminate the lease of the premises by 3 months' notice should their own premises be required by the Southern Railway for extension or rebuilding.

"In the event of any rent being in arrears for more than 21 days the Landlords to have the right to take down the said hoarding or advertisements and tenancy to cease without incurring any liability for damage of the Company's property."

The A. A. Company then employed first-class contractors to put up the hoarding, which was commenced on September 26 and completed notwithstanding the plaintiffs' protests. It

FARWELL J.
1931
STENING v. ABRAHAMS.

was a substantial erection intended to last from ten to fifteen years and not for a mere temporary purpose. The base rested on the fascia of the shop window, and the hoarding went up 3 or 4 feet above the flat roof. It extended laterally the whole width of the front wall, from which it was 2 or 3 inches off. It was secured to the wall by nails and battens fastened to the stucco, and to the roof by wires. When fixed it was covered with advertisements of whisky and theatres, and it was not a beautiful object.

On November 27 the plaintiffs, having failed to persuade the defendants to remove the hoarding, commenced this action for a declaration that its erection was a breach (inter alia) of the above covenant, a mandatory injunction to remove it, and damages.

The defendants denied that there was any breach of covenant.

In March, 1930, i.e., before trial, the Local Authority intervened pointing out that no plans for the hoarding had been submitted, and in one or two other respects it failed to comply with their by-laws. In the result, the hoarding was removed on October 14, 1930, and the holes in the stucco were filled up at a cost of 12*s*. 6*d*. The wall was then repainted at a cost of 4*l*. and was now in perfect condition.

The defendants, however, still insisted on their right to license the erection of a hoarding complying with the by-laws, and the action came on to determine their rights.

Sir Herbert Cunliffe K.C. and *P. M. Walters* for the plaintiffs. The defendants' premises extend ad medium filum of the road. They have excluded themselves from the physical possession of the front of the wall and a 3-inch column of air outside it. That is a clear parting with the physical possession of part of the premises. The question whether the licence amounts to a demise so as to be a parting with the legal possession is absolutely immaterial.

There are numerous authorities on other facts and other documents, such as *Heard* v. *Stuart* (1); *Jackson* v. *Simons* (2);

(1) (1907) 24 Times L. R. 104.

(2) [1923] 1 Ch. 373.

Abrahams v. *Mac Fisheries, Ld.* (1); and *Chaplin* v. *Smith* (2), but they are of no real assistance here.

Archer K.C. and *S. N. Bernstein* for the defendants. The licence creates no legal interest in the premises. It is a mere personal contract. The defendants could not be restrained from interfering with the hoarding. The licensees' only remedy would lie in damages: *King* v. *David Allen & Sons, Billposting, Ld.* (3); *Walton Harvey, Ld.* v. *Walker & Homfrays, Ld.* (4); *Frank Warr & Co., Ld.* v. *London County Council.* (5)

In those circumstances there is no legal exclusion of the defendants and therefore no breach of this covenant.

FARWELL J. [after stating the facts, and dealing with two other covenants as to which he held there had been no breach, continued:] The next question is whether the defendants have broken the covenant against parting with possession of any part of the premises. The plaintiffs say that by giving the A. A. Company the right to use the front of the wall for an advertisement hoarding, the defendants have parted with the possession of that front and a 3-inch stratum of air outside it.

I must entirely disclaim any attempt to define the meaning of parting with possession generally. It must always be a question of fact and the construction of the particular agreement in each case, and it cannot be determined by looking at the document alone.

But in my view a lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from the legal possession of that part. If there is anything in the nature of a right to concurrent user there is no parting with possession. Retention of a key may be a negative indicium (6), and the authorities on the whole show that nothing short of a complete

(1) [1925] 2 K. B. 18.

(2) [1926] 1 K. B. 198.

(3) [1916] 2 A. C. 54.

(4) Ante, p. 145.

(5) [1904] 1 K. B. 713.

(6) E.g. *Jackson* v. *Simons* [1923] 1 Ch. 373; *Chaplin* v. *Smith* [1926] 1 K. B. 198.

exclusion of the grantor or licensor from the legal possession for all purposes amounts to a parting with possession. The fact that the agreement is in form a licence is immaterial, as a licence may give the licensee so exclusive a right to the legal possession as to amount to a parting with possession.

Now does the present licence exclude the defendants from any part of the premises? It no doubt gives the licensees the exclusive right to use the wall for an advertisement hoarding. No one, including the defendants, can use the wall for that purpose. On the other hand the defendants remain to a large extent in possession of the wall.

The plaintiffs contend that the front of the wall is wholly in the control of the licensees. That is not the true view. The right of the licensees to put up their advertisement hoarding does not prevent the defendants from using the wall so long as they do not interfere with their licensees. Suppose the licensees determined to cease their user for a period. The defendants could certainly repair the wall without their leave. Merely giving the licensees a right to use the wall for this particular purpose is not a parting with possession within this covenant. I do not decide that in no case could such a licence amount to a parting with possession. I am limiting my judgment exclusively to the facts and licence in this particular case. The plaintiffs therefore fail on this covenant.

[His Lordship then dealt with a covenant against annoyance on which he held that the plaintiffs had made out their case, and were entitled to a declaration, and if they desired it an injunction. They did not however ask for an injunction, and the order merely gave them a declaration and costs.]

Solicitors: *Bolton, Jobson & Yate-Lee; W. Ewart Craigen.*

G. R. A.

PARKER *v.* JUDKIN.

[1930. P. 507.]

C. A.
1930
MAUGHAM J.
Nov. 12, 13;
Dec. 2.
C. A.
1931
Feb. 13.

Vendor and Purchaser—Will—Construction—Devise and Bequest of Freeholds and Business by Testator to his Sons beneficially subject to Payment of Annuity to Widow—Sons appointed Executors—Sale of Freeholds and Business to Company by Sons "as beneficial owners"—No Mention of Annuity in Conveyance—Undertaking by Company by separate Deed to satisfy Annuity—Sale by Company of Part of Freeholds—Purchaser, whether put upon Inquiry as to Charge of Annuity by Terms of Conveyance—Notice to Purchaser of Facts in Memorandum and Articles and Execution of Conveyance by Company—Debentures issued by Company—Company unable to pay Annuity—Liability of Company and Debenture Holders.

By his will a testator, after appointing his sons G. and S. executors and making certain bequests, devised and bequeathed property, including his businesses and business premises, to them beneficially, conditionally upon their making certain payments, including an annuity of 300*l.* to the testator's wife and two legacies, and for the payment of debts and liabilities due and subsisting in respect of the testator's businesses at the time of his death, including any mortgages or charges on the business premises and all money due to the testator's bankers. He gave property not otherwise disposed of to the testator's wife absolutely subject to the payment of his debts other than those "charged" on the bequests and devise to his sons. After the death of the testator in the year 1914 G. and S. entered into possession of his business and premises. A company was formed to acquire the business and the freehold and other premises in which it was carried on. The sale agreement, dated February 16, 1923, recited that G. and S. had for many years carried on the said business in partnership, and under the terms thereof part of the consideration was cash and the allotment of shares, the residue of it being an undertaking by the company to satisfy all the debts, liabilities and engagements of the vendors in relation to the business, including the annuity. The said agreement stated that the premises were sold free from all incumbrances and charges except the mortgages and charges specified in the third schedule thereto. The charges in that schedule included the annuity and a charge to a bank. The agreement was carried out by two deeds, both of which were dated June 1, 1923, the first being an assignment of the goodwill and book debts, and the second a conveyance of the freeholds on which the businesses were carried on. The conveyance recited the will of the testator so far as regarded the appointment of executors and the gift to G. and S., and probate of the said will, and G. and S. for a cash consideration thereby conveyed the said freeholds "as beneficial owners," and also similarly assigned certain leaseholds, some of which had, and others had not, belonged to the testator in separate witnessing parts. The conveyance recited a charge by the testator on certain leasehold property in favour of his bank, and that the leases which had belonged to the testator had been deposited by him with the bank as further security for moneys due from him, and that the same remained, and that another lease had since been deposited with the bank to secure the repayment to the bank of moneys overdrawn by the vendors on their account with the bank, and were made subject to the charge and the amount thereby secured. The conveyance contained no reference to the annuity, and its execution by the company was attested by one of the vendors, who was a director of the company, as such director.

The company subsequently paid off the charge to the bank and sold the freehold premises to J., free from incumbrances, and the same were conveyed to him by a conveyance containing no reference to the annuity. The abstract of title included the testator's will, the conveyance of the freeholds by G. and S. to the company, and the reconveyance to the company by the bank, but not the sale agreement of February 16, 1923. For some five years after it had acquired the business, the company paid the annuity. It then issued debentures containing a floating charge on its present and future property and assets. The company having ceased to pay the annuity, in an action by the widow for a declaration that the annuity was a charge upon the premises sold to J. and upon the company's present and future property and assets, ranking in priority to the debentures, and also for payment of the arrears of the annuity :—

Held, by Maugham J., (i.) that, upon the true construction of the will, the annuity and legacies were charged upon the bequests and devise to G. and S. :

(ii.) that, as between the annuitant and the two legatees and the company, the premises acquired by the company were acquired subject to the charge :

(iii.) that the debenture holders, having only an equitable charge, were in a like position :

(iv.) that J. was in the position of a purchaser for value without notice of the charge, since reasonable inquiries and inspection by his solicitor would not have brought the fact of the charge to his knowledge (Conveyancing Act, 1882, s. 3, sub-s. 1) :

(v.) that the rule as to notice of a document being notice of its contents applies in general only to documents which form part of the chain of title, and that this does not include articles of association of a company which might have been called for to prove the execution of a deed.

Corser v. *Cartwright* (1875) L. R. 7 H. L. 731 and *In re Henson* [1908] 2 Ch. 356 followed.

On appeal by the plaintiff against so much of the order as dismissed her claim against J. :—

Held, by the Court of Appeal (affirming the decision of Maugham J.), that none of the indicia on the face of the conveyance to the company was sufficient to put J. upon inquiry whether the vendors were selling otherwise than as executors and that he was entitled to assume that they were so selling.

ACTION.

The following statement of facts is taken from the considered judgment of Maugham J. :—

By his will dated April 15, 1913, the testator John Thomas Parker after appointing Ernest William May and his sons

George Dancer Thain Parker and the defendant Sydney John Parker executors thereof and making certain specific and pecuniary bequests proceeded to dispose of the bulk of his property in the following terms: "I bequeath to the said George Dancer Thain Parker and Sydney John Parker absolutely the policy or policies of insurance upon my life and the full benefit thereof and also the share and interest in the residuary estate of my father to which I am entitled under the trusts of his will in the event of any of my sisters dying without leaving any child who shall become entitled as in the said will mentioned and also the goodwill of my businesses and the stock-in-trade plant and effects employed therein and the benefit of all contracts subsisting in respect of the said businesses and all book debts and moneys due to me in respect thereof or standing to the credit of my business account at my bankers at the time of my decease and I devise and bequeath to them all the freehold and leasehold premises on which the said businesses may be carried on provided always and I declare that these bequests and devise are conditional on the said George Dancer Thain Parker and Sydney John Parker discharging and indemnifying my general estate from all debts and liabilities due or subsisting in respect of my businesses at the time of my decease including any mortgages or charges on the business premises and all moneys due to my bankers and on their paying the pecuniary legacies hereinbefore bequeathed and the duty thereon and also the estate duty payable in respect of the value of the said bequests and devise and also on their paying to my wife during her widowhood the sum of three hundred pounds per annum by equal quarterly payments the first whereof shall become payable on such day as shall be three months after the date of my decease and also paying to my son John Frederick Parker on the decease of my wife (if he shall then be living) the sum of three hundred pounds and also paying to my son Herbert Parker on the second anniversary of the decease of my wife (if he shall then be living) the sum of two hundred pounds and I declare that the said George Dancer Thain Parker and Sydney John Parker shall enter into such bond or covenant for the payment of the said debts liabilities and other moneys as the said Ernest William May shall require. I give devise and bequeath to my wife absolutely all the real and personal estate to which I may be beneficially entitled at the time of my decease or of which I may then have power to dispose beneficially by will for any purpose I may think fit and not hereby otherwise disposed of subject nevertheless to the payment of my debts (other than those charged on the bequests and devise to my sons hereinbefore contained) and my funeral and testamentary expenses except the portion of the estate duty charged on the bequests and devise to my said sons."

The testator died on February 24, 1914, and his will and a codicil not material to the present case were proved on March 28, 1914, by George Dancer Thain Parker and the defendant Sydney John Parker. Ernest William May had renounced probate and it may be added here that George Dancer Thain Parker disappeared some years ago and his whereabouts is not known. It will be observed that, having regard to the date of the testator's death, the legislation of 1925 does not apply.

The testator was at the date of his death carrying on the business of a boot manufacturer at Long Buckby in the County of Warwick and at certain leasehold premises at Rood Lane and the Royal Exchange in London. The two sons George Dancer Thain Parker and the defendant Sydney John Parker entered into possession of the business and premises and presumably paid off the debts and liabilities due or subsisting in respect of the business and the legacies immediately payable. They, or the company which they formed, as I am about to state, also paid the annuity of 300*l.* to the testator's widow till the month of August, 1929. It appears, however, that they did not enter into the covenant for the payment of the debts liabilities and the annuity and the two postponed legacies which they were required to enter into by the terms of the will. No express assent to the devise and bequest to them seems to have been given and that matter must be left to inference from the facts.

On March 9, 1923, the defendant company was formed with the name of J. Parker, Ld., that having been one of the names under which the business had been carried on, for the purpose of acquiring the undertaking and assets of the business as a going concern. The capital of the company was 5000*l.*, divided into shares of 1*l.* each. The first directors of the company were the defendant Sydney John Parker and one Edward Cassleton Elliott, who were to continue to hold office until retirement or disqualification, without being subject to the provisions for retirement by rotation contained in the articles of association. These two gentlemen were also the two signatories of the memorandum and articles. The preliminary agreement was dated February 16, 1923, and was made between George Dancer Thain Parker and the defendant Sydney John Parker as vendors of the one part and the trustee for the intended company of the other part. There was a recital that the vendors had for some time past carried on business together in partnership as bootmakers under the style of J. Parker. Part of the consideration for the sale was the sum of 3500*l.* payable as to 1750*l.* in cash to George Dancer Thain Parker and as to 1750*l.* by the allotment to the defendant Sydney John Parker of 1750 shares of 1*l.* each credited as fully paid. The residue of the consideration was the undertaking by the company to pay or satisfy all the debts, liabilities and engagements of the vendors in relation to the business, including the annuity of 300*l.* per annum to be paid to the widow of the late John Thomas Parker during her widowhood, and also the two legacies of 300*l.* and 200*l.* payable to John Frederick Parker and Herbert Parker after the death of the widow. Clause 5 of the agreement began in the following terms: "The premises are sold free from all incumbrances except the mortgages or charges specified in the third schedule hereto." The third schedule included the annuity of 300*l.* per annum and the two legacies of 300*l.* and 200*l.* and also included a charge in favour of the Northamptonshire Union Bank, Ld., to secure the bank overdraft of the vendors' firm.

The adoption agreement entered into by the company (if any) was not produced at the hearing; but the agreement seems to have been carried out by two deeds both dated June 1, 1923, the one being an assignment to the company of the goodwill and book debts, and the other being a conveyance and assignment of the freehold and leasehold premises of the vendors in connection with the business. I should add that by clause 3 of the first of these two deeds the company covenanted to pay, discharge and fulfil all the debts, liabilities and engagements of the vendors in relation to the business. The second deed contained a recital of the charge to the bank effected by deposit of the deeds, but contained no reference to the annuity of 300*l.* per annum or the two legacies above referred to. The will of the testator was shortly recited, and probate thereof to the vendors as executors. The conveyance of the land was effected by the vendors (who were described as seised as joint tenants of the hereditaments and premises agreed to be sold and assigned) as beneficial owners. It purported to be a sale for 680*l.*, and the habendum was subject to a charge by way of collateral security to the bank to secure the sum of 779*l.* 8*s.* 4*d.* It should be noted that this conveyance was not made subject to the charge for the annuity and legacies.

The company entered into possession and carried on business at first with success. In the year 1924 the company sold certain Cornhill leaseholds which it had acquired to a purchaser for the sum of 6100*l.* On November 19, 1925, the company sold the freehold premises at Long Buckby to the defendant Ralph Judkin. The conveyance is in the ordinary form. It recites that the company was seised in fee simple in possession free from incumbrances of the hereditaments and had agreed to sell the same to the purchaser for a like estate at the sum of 690*l.*; and in other respects the conveyance is simply in the form of a conveyance in fee simple free from incumbrances to the purchaser. It seems that the proceeds of sale of the Cornhill leaseholds had been utilized in paying off the charge to the bank, so that the company was in a position to hand over, and did hand over, the deeds.

The plaintiff however claims that the defendant Ralph Judkin had notice of the charge upon the Buckby freeholds created, as she contends, by the terms of the will, and that he accordingly took those freeholds subject to such charge.

In July, 1927, the defendant company issued to the defendants Sydney John Parker, Roland William Mussett and Clement Lewis Sealey certain debentures containing a floating charge in the ordinary form upon the undertaking and property and assets of the company both present and future. Such a charge, of course, is merely an equitable charge, and the position of the debenture holders as between themselves and the plaintiff is no better than the position of the company.

On December 20, 1929, the company intimated that as the result of the trading position it was unable to pay any further annuity to the plaintiff. The writ was issued on February 20, 1930, the defendants being Ralph Judkin, the company, Sydney John Parker, Roland William Mussett and Clement Lewis Sealey; and the plaintiff claimed declarations that the annuity was a charge upon the property in Warwickshire, and upon the company's present and future property and assets, ranking in priority to the debenture holders, and claimed also payment of the arrears.

Topham K.C. and *E. Riviere* for the plaintiff. On the construction of the will and of the authorities, this would be construed as a charge: *Cunningham* v. *Foot* (1); *Hodge* v. *Churchward.* (2) There are other cases on the question of personal liability: *Rees* v. *Engelback* (3); *Pickwell* v. *Spencer* (4); *In re Oliver.* (5) The defendant Judkin had notice that the conveyance to the company was made by the vendors, not as executors, but as beneficial owners, and so did not defeat the annuity. The form of the conveyance was itself sufficient to put him on inquiry as to this, including the fact that one of the vendors attested the execution by the company as one of its directors. Further, he ought to have called for the memorandum and articles of the company, which would have shown him that the sale was to a company, of which one of the vendors was a director, and therefore that such sale was not made by them as executors.

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(1) (1878) 3 App. Cas. 974.
(2) (1847) 16 Sim. 71.
(3) (1871) L. R. 12 Eq. 225.
(4) (1872) L. R. 7 Ex. 105.
(5) (1890) 62 L. T. 533.

Archer K.C. and *J. Chadwick* for the defendant Ralph Judkin. The beneficiaries have a right of sale under the Land Transfer Act: *In re Henson* (1); *Colyer* v. *Finch.* (2) It is impossible to say that this is not a conveyance by executors. It is a very apt conveyance by executors under circumstances not requiring notice. The agreement is a secret new equity, put alongside a plain conveyance which would deceive any one. It would be pessimi exempli that the Court should hold that a purchaser taking under a deed of that kind necessarily suffers from infirmity of title. The question is whether, under the doctrine in *Whiteley* v. *Delaney* (3), the defendants would be entitled in any event to be subrogated to the bank.

Garrow Tomlin (*R. F. Roxburgh* with him) for the defendants J. Parker, Ld., Roland William Mussett, Clement Lewis Sealey and Sydney John Parker.

Topham K.C. in reply referred to *Farrar* v. *Farrars, Ld.* (4); and *Rowell* v. *Satchell.* (5)

Cur. adv. vult.

Dec. 2. MAUGHAM J. [having stated the facts as set out above :] The first question that arises is as to the true construction of the will of John Thomas Parker. Was the annuity of 300*l.* as the result of the will charged upon the property devised and bequeathed to the testator's two sons, or was there a trust created to pay the annuity out of the rents and profits or to sell a sufficient part of the assets to pay the same, or was there a mere personal liability imposed on the two sons, or, finally, was there both a personal liability and either a charge or a trust created? A number of authorities have

(1) [1908] 2 Ch. 356.
(2) (1856) 5 H. L. C. 905.
(3) [1914] A. C. 132.
(4) (1888) 40 Ch. D. 395.
(5) [1903] 2 Ch. 212.

been cited dealing with wills of a somewhat similar character. They will, for the most part, be found collected in the 7th ed. of Jarman, vol. ii., p. 1435, and I do not think it necessary to state the effect of each in detail. It cannot, I think, be doubted that the Court, animated by the desire to carry out what it has conceived to be the intention of the testator, has in these cases put a somewhat artificial construction on the words employed; but I think a modern judge is well advised in cases of will construction to follow the current of authority if there be such, rather than to express his own views. On careful consideration and having particular regard to the final clause in the will, where reference is made to the payment of the testator's debts other than those "charged on" the bequests and devise to the testator's sons, I have come to the conclusion that, on the true construction of the will, the annuity and the two legacies of 300*l.* and 200*l.* must be taken to have been charged on the bequests and devise to the two sons.

The next question will be as to the effect of such a charge, and in particular whether the executors being devisees and legatees of the property could sell free from the charge. Here I think the observations of Lord Cairns in *Corser* v. *Cartwright* (1) are decisive. He refers with approval to two well known cases of *Watkins* v. *Cheek* (2) and *Colyer* v. *Finch* (3), and proceeds as follows: "Your Lordships will find that both of these cases liken the position of a devisee, who is also an executor, having real estate charged with the payment of debts, to the position of an executor dealing with personal estate, and say that just as an executor dealing with the personal estate of a testator may sell it or mortgage it for the purpose of raising money, and as in the case of personalty it is to be inferred, unless the contrary is shewn, that he is doing that for the purpose of paying debts, so, with regard to one holding real estate charged with the payment of debts and filling the position of executor, it is also to be inferred; if he raises money by sale or mortgage of that real estate,

(1) L. R. 7 H. L. 731, 736.
(2) (1825) 2 S. & St. 199.
(3) 5 H. L. C. 905.

C. A.
1930
PARKER
v.
JUDKIN.
Maugham J.

that he is using the money, as he properly ought to use it, for the same purpose." He makes it plain in the same speech that a purchaser is not put upon inquiry unless it can be shown that he knew that the purchase money was not going to be employed in the payment of the debts, and that the same proposition applies to the case of a charge to secure debts and legacies or debts only. In the case of *In re Venn and Furze's Contract* (1) Stirling J. said: "It appears to me that I have the high authority of Lord Cairns and Lord Cranworth for saying that where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary; and further, that the contrary is not made out merely from the circumstance that the conveyance or mortgage does not purport to be executed by him in that capacity." That passage was cited with approval by Swinfen Eady J. in the case of *In re Henson* (2), and applied to a case where there had been a devise of land in fee subject to a general charge of debts and legacies to a devisee who was also an executor; and he held that the devisee was empowered to give a good receipt to the purchaser or mortgagee who was not bound to see to the application of the purchase or mortgage money, even though the devisee did not expressly purport to execute the conveyance in his capacity of executor. I should perhaps add that in this case s. 2 of the Land Transfer Act, 1897, was applicable to the testator's real estate. It follows that the sons could have sold both the land and the personal estate devised and bequeathed to them free from the annuity and the two legacies, and that the purchaser would not have been bound to inquire whether any of the debts of the testator remained unpaid at any rate if the sale took place, as it did, within twenty years of the testator's death: Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 246.

It is now necessary to consider, first, the position of the company and its debenture holders, and secondly, that of

(1) [1894] 2 Ch. 101, 114.

(2) [1908] 2 Ch. 356

C. A.
1930
PARKER
v.
JUDKIN.
Maugham J

the defendant Judkin who claims to be a purchaser for value without notice. The preliminary agreement with the company clearly contemplated that the company would become liable to pay the annuity and the two legacies and that the whole of the premises would be sold subject to a charge to secure the same. The assignment of the goodwill and book debts contains a covenant to pay the debts, liabilities and engagements of the vendors in such a form as in my opinion to cover the annuity and the two legacies. The company therefore not only have full notice of the facts as to the charge and of the circumstance that the vendors were not selling as executors, but intended to acquire the property subject to the charge.

In my judgment it follows that the plaintiff is entitled to succeed as against the company and the debenture holders who, as I have said, are in no better position than the company. I will add that if I had come to the conclusion that there was no charge created by the will to secure the annuity and the legacies, I should still have held that as the result of the form of the agreement for sale to the company and of the subsequent documents there was an equitable charge created in favour of the annuitant and the legatees which could have been enforced by them though not parties to the transaction: see *In re Flavell.* (1)

The position of the defendant Judkin is, however, different. To him no doubt must be ascribed such notice of any fact as would have come to the knowledge of his solicitor if such inquiries and inspections had been made as ought reasonably to have been made: Conveyancing Act, 1882, s. 3, sub-s. 1. The abstract of title sent to his solicitors included the will of John Thomas Parker, the conveyance of the freeholds of June 1, 1923, by the two executors to the company, and a reconveyance of October 30, 1923, by the bank to the company. The abstract, of course, did not include the preliminary agreement with a trustee for the company, nor the assignment of the goodwill and book debts to the company. The conveyance of the freeholds to the company, as I have previously stated, was for cash, and the sale was subject

(1) (1883) 25 Ch. D. 89.

C. A.
1930
PARKER
v.
JUDKIN.
Maugham J.

to a charge to the bank, but otherwise free from incumbrances. In my opinion on the authorities cited Judkin's solicitor was justified in accepting the view that the sale to the company of the freeholds in question was a sale free from the charge for the annuity and legacies. It is contended on behalf of the plaintiff that his solicitor should have asked to see the memorandum and articles of association of the company in order to be satisfied that the conveyance by the company to him was properly executed, and that he would then have been bound to read the whole of the memorandum and articles, and, finding that the defendant Sydney John Parker was to be a permanent director of the company, and looking to the other surrounding circumstances, he would have been put upon inquiry as to the propriety of the sale to the company if regarded as a sale by executors. I do not agree. In my opinion a purchaser is not bound on completion to require evidence of facts as to due execution of the conveyance by a trading company; for I think he is entitled, if he pleases, to rely on the presumption that formalities with regard to the use of the company's seal have been or will be properly observed. Nor do I think a purchaser is affected with notice of all facts contained in a memorandum and articles which might have been produced if demanded in order to prove due execution of a deed forming part of the title. The rule as to notice of a document being notice of its contents, applies, I think, to documents which in a true sense affect the title, that is, form part of the chain of title (see Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 232); and this does not include the articles of association of a company which may have been a conveying party. Finally, I do not agree that a perusal of the memorandum and articles would have made it necessary for a purchaser to make further inquiries in regard to the propriety of the sale. An independent purchaser from executors would not be at all unlikely to insist on one of the vendors, even though an executor, becoming a director of the new company for a time, and so far as I can see, that is the only fact which might have aroused the suspicions of a proposed purchaser. The conveyance by the vendors as beneficial owners is not, I think, a suspicious circumstance when the executors are sons of the testator and substantial beneficiaries.

Moreover, the sale to the company was not on any view of the facts void, but merely voidable; and it seems to me that even if there was notice of an irregularity, the result would not be that the defendant Judkin took his legal estate in the Buckby freeholds subject to the charge, but at most that the plaintiff annuitant could bring an action to set aside the sale to the company and the sub-sale with notice to the defendant Judkin.

I would add that the plaintiff seems to have been a confirmed invalid since the year 1923, and that her affairs appear to have been managed by her eldest son, who was called as a witness before me. He was well aware of the formation of the company, but seems to have made no inquiries with regard to the annuity or how it was to be secured in the future.

In my opinion the claim against the defendant Judkin fails and must be dismissed with costs. Against the other defendants the action succeeds and they must pay the plaintiff's costs of the action as against them.

K. R. A. H.

C. A.

The plaintiff appealed from so much of the order as dismissed her claim against the defendant Judkin. The appeal was heard on February 13, 1931.

On the appeal the arguments turned almost entirely on the inferences to be drawn from the recitals, and the facts appearing on the face of the deed of June 1, 1923, by which the freeholds and leaseholds were conveyed to the company. The deed recited the will of the testator so far as regarded the appointment of executors and the gift to the two sons. It also contained the following recital: "And whereas lease No. 1 was deposited by the said John Thomas Parker during his lifetime with the Bank by way of further security for the repayment of moneys due by him to the Bank and the said lease, No. 1 now remains and lease No. 2 has since been deposited with the Bank for the purpose of creating a charge thereon to secure the repayment to the Bank of moneys overdrawn by the vendors on their account with the Bank." The vendors then conveyed the freeholds "as beneficial owners," and also similarly assigned the leaseholds subject to the Bank's charge by separate witnessing parts. The conveyance contained no reference to the annuity, and its execution by the company was attested by one of the vendors, who was a director of the company, as such director.

W.P. Spens K.C. and *E.Riviere* for the appellant. The question, so far as the respondent Judkin is concerned, is whether he took the freehold property free from the charge of the appellant's annuity. Maugham J. has held that Judkin was entitled to assume that the testator's two sons were selling to the company as executors free from all charges. It is submitted, however, that Judkin was not entitled to complete the conveyance to him from the company without making inquiries, which, if he had made them, would have brought to his knowledge the fact that the two sons had consented to the devise to themselves and therefore could not have conveyed to the company as executors so as to defeat the charge of the annuity. In the conveyance of June 1, 1923, of the freeholds to the company the two sons purported to convey "as beneficial owners." There is nothing on the face of the deed to suggest that they were conveying otherwise than as beneficial owners. Further, one of the sons who so conveyed was also a director of the company and attested the execution of the deed by the company. The property purchased by Judkin was purchased by him at a sale by auction, and in the particulars of sale the will was referred to and it was contained in his abstract. He therefore had actual notice of the will and its contents. The question, therefore, is whether though the sons sold to the company as beneficiaries Judkin was entitled to assume they were selling as executors so as to override the charge of the annuity. They had assented as executors to the devise to themselves, and their duties as executors and their power to sell as such had then come to an end: *Attenborough* v. *Solomon.* (1) Here Judkin was not a purchaser from the persons alleged by him to have been executors but a purchaser from the company who purchased from them. If he had any suspicion as to the character in which the sons were selling he was bound to make inquiries.

If the sons had been selling to the company as executors and not as beneficial owners the transaction would have been voidable, because they would have been selling to one of themselves, as one of them was a director of the company.

Further, the conveyance conveyed in very similar terms other property of which the sons were admittedly the beneficial owners, and in addition showed that part of the property given to them by their father's will had been pledged to the Bank to secure their own account. All these facts pointed to the fact that they were selling to the company as beneficiaries and were inconsistent with the suggestion that the conveyance might have been a conveyance by executors.

Archer K.C. and *Garrow Tomlin* for the respondent Judkin were not called upon to argue.

LORD HANWORTH M.R. This is an appeal from a decision of Maugham J., who had to decide a somewhat interesting conveyancing point. It has been brought to the attention of the Court by Mr. Spens and Mr. Riviere, who have undertaken to present the case on behalf of the appellant who appears before this Court as a poor person, and we have had the advantage of the argument from them, for which we are indebted.

It is unnecessary to recount the facts, which are fully stated in the judgment of Maugham J. The point is really a short one, as Mr. Spens presented it to us, and is whether or not the defendant Judkin was put upon inquiry and ought to have ascertained whether or not the premises which were conveyed to him by the deed of November 19, 1925, were subject to a charge of an annuity of 300*l.* in favour of the

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(1) [1913] A. C. 76, 82.

C. A.
1931
PARKER
v.
JUDKIN.
Lord Hanworth M.R.

plaintiff. The plaintiff is the widow of the testator, who died as long ago as 1914. By his will he gave the premises, which were ultimately conveyed to Judkin, to his two sons subject to a charge thereon for payment of the annuity of 300*l.* by equal quarterly payments. In the will E. W. May was also made an executor with the testator's two sons, but he renounced probate. Perhaps it is worth noticing that in his will the testator says: "I declare that [the two sons] shall enter into such bond or covenant for the payment of the said debts, liabilities and other moneys as the said Ernest William May shall require." In fact May did not require any such bond to be entered into. The sons took possession and carried on the business. Ultimately on February 16, 1923, an agreement was entered into between them and one Smith, who was acting as trustee for a company which was about to be formed, for the sale of these premises at Long Buckby. In that agreement there is a reference to the charge which was imposed upon the premises by the terms of the will. On March 9, 1923, the company was incorporated, and pursuant to the agreement, but without definite reference to it, on June 1, 1923, there was a conveyance to the company of these freehold premises. The company apparently got into difficulties, and there was a conveyance by the company on November 19, 1925, to Judkin.

The plaintiff endeavours to assert that Judkin has taken these premises subject to the charge created by the testator's will in her favour. If the sale to the company was a sale by the executors, the two sons of the testator, then the sale by the company would be a sale which would be freed and discharged from the charge created by the will. It is said on behalf of the plaintiff that Judkin took with such notice as ought to have put him upon inquiry whether or not the freehold premises, which were being conveyed, were in fact freed. The conveyance to the company was made by the two sons as beneficial owners. It is said that there are sufficient indicia on the face of the conveyance to show that the two sons were conveying not as executors, but as trustees. This transaction took place within the period of twenty years to which the learned judge refers, and in respect of which he takes note that there is no necessary deduction to be drawn against the sale being by the executors by reason of the lapse of time, and when one looks into the detailed points which are said to have put Judkin upon inquiry, they seem to fail.

I will take the one point to which Mr. Riviere referred. In the recitals contained in the conveyance of June 1 there is the following recital: "And whereas lease No. 1 was deposited by the said John Thomas Parker during his lifetime with the Bank by way of further security for the repayment of moneys due by him to the Bank and the said lease No. 1 now remains and lease No. 2 has since been deposited with the Bank for the purpose of creating a charge thereon to secure the repayment to the Bank of moneys overdrawn by the vendors, on their account with the Bank," and so on. It would seem that the history of the debt due to the Bank had been traced, that it originated with the testator and was a debt of his, and did not necessarily originate with the vendors. When one comes to the operative part of the deed the habendum is: "To hold the same unto the use of the purchasers in fee simple subject to the charge thereon and to the said sum of 779*l*. 8*s*. 4*d*. thereby secured." That sum of 779*l*. 8*s*. 4*d*. was a debt due to the Bank; in other words, it shows that there was then an unpaid debt due to the Bank, which was payable by these two sons as executors of their father and payable out of his estate. I need not refer to more, but the question then arises whether or not the principle laid down by Lord Haldane in *Attenborough* v. *Solomon* (1) applies, namely, that there had been an assent by the two sons, as executors, to the devise to themselves, and that there ought to be an inference from their conduct that they had ceased to act in the capacity of executors. In my opinion the answer is No, and in those circumstances the decision of Maugham J., with whose judgment I desire to express my complete concurrence, must be affirmed, and the appeal must be dismissed.

(1) [1913] A. C. 76, 83.

LAWRENCE L.J. I agree. Mr. Spens and Mr. Riviere contended that Mr. Judkin was put on inquiry as to whether the vendors to his vendor were conveying in their capacity as executors or in their capacity of beneficiaries by reason of the form and contents of the conveyance to his vendor. In support of this contention they relied upon three matters appearing on the face of that conveyance. In the first place, the fact that it appeared from the attestation clause to the conveyance that one of the vendors was a director of the company, and therefore if he were conveying as an executor the conveyance would be voidable. In my opinion the fact that one of the vendors attested the execution by the company of the conveyance was not sufficient to put Mr. Judkin on inquiry as to whether the vendors were conveying the property to the company as executors or as beneficiaries. As a matter of fact the vendors were shown on the face of the conveyance to the company to be the sole beneficiaries under their father's will as well as executors, and therefore the persons who would have been entitled to have it set aside if there had been anything wrong in the transaction. I think that Mr. Judkin was justified in ignoring such a contingency, which seems to me to be far too remote to have put him upon such an inquiry as is suggested. Mr. Spens frankly admitted that if this point were the only one he would not be able to succeed upon it. The second matter relied upon was that the conveyance was expressed to be made by the vendors as beneficial owners. That fact, however, is also admitted not to be enough by itself to put Mr. Judkin on inquiry. As already stated, it appeared on the face of the conveyance that the vendors were in fact beneficial owners of the property, but this fact did not, of course, relieve them from their obligation as executors to discharge the debts of the testator, one of which was shown by the conveyance to be still unpaid. I agree with Maugham J. that the fact that the conveyance was made by the vendors as beneficial owners in such circumstances did not put Mr. Judkin upon inquiry. It is well settled that executors, although not appearing upon the face of the conveyance to be selling in that capacity, can convey property forming part of their testator's estate free from all charges created by the testator. The third matter relied upon was the recital in the conveyance, from which it appeared that the title deeds of the two leasehold properties had been deposited with the Bank to secure the account of the vendors and not the account of the testator; as against that fact, however, there is the recital that there was a debt still outstanding due to the Bank which had been created by the testator, and there is nothing to show that the account might not have been an executorship account. It is quite true that the will of the testator placed the vendors under an obligation to discharge the outstanding debt out of their own moneys; but that obligation did not relieve them from their duty to the estate as a whole or prevent them from exercising their power of sale as executors for the purpose of discharging that debt and all other outstanding debts if any. In my judgment, therefore, the third matter relied upon is not sufficient to put Mr. Judkin upon inquiry.

Mr. Spens, however, contended that although none of the three matters to which I have referred when taken singly might be sufficient to put Mr. Judkin on inquiry, yet when they are combined they were sufficient for that purpose. I do not think that this contention is well founded. If each matter be insufficient of itself to create suspicion in the mind of an ordinary purchaser, it ought not to be held that he was put on inquiry, because there were three of such matters. After having examined each matter separately and having come to the conclusion that it is not sufficient to put the purchaser on inquiry, the case against him is in no way strengthened by putting the three matters together. For these reasons I agree that the decision of Maugham J. is right and ought to be affirmed.

Romer L.J. I agree. The only question arising on this appeal is whether there is sufficient in the deed of June, 1923, to give Judkin notice that the vendors in that were conveying not as executors but in their beneficial capacity, or,

C. A.
1931
PARKER
v.
JUDKIN.
Romer L.J.

what comes to the same thing, whether there is sufficient in that deed to have put Judkin upon inquiry which should have led to the discovery of the fact that they were conveying not as executors but in their individual capacities.

There are four matters relied on by Mr. Spens and Mr. Riviere as matters which raised enough suspicion to put Judkin on inquiry. The first is that the vendors in the deed of 1923 were expressed to convey as beneficial owners. That point has long been settled. In *In re Venn and Furze's Contract* (1), one of the cases referred to by Maugham J. in his judgment, the facts were that the vendor of leaseholds derived his title through a conveyance made by one T. T. was in fact an executor, but had not purported to assign the leaseholds as executor; he had indeed assigned them as beneficial owner. Stirling J. held that the abstract showed a good title and that the purchaser could not insist upon a requisition requiring the vendor to show that the executor was discharging his duties when he was selling, in other words, that he was selling as executor; it was held that the purchaser was entitled to assume that T. was selling as executor, although he had purported to assign as beneficial owner. That case was followed by Swinfen Eady J. in *In re Henson* (2), to which Maugham J. also refers.

The second point upon which reliance is placed is the fact that the assignment of June 1, 1923, includes not only freehold and leasehold property which formed part of the testator's estate, but also two leaseholds, Nos. 2 and 3, which had been acquired after the death of the testator. It is said, therefore, that Judkin had notice that there was contained in the assignment property which could be only assigned by the vendors in their individual capacity and not as executors. I pointed out in argument, and I will point it out again, that if one looks at the form of conveyance of June 1, 1923, it seems rather to suggest that the vendors are dealing with the freehold and leasehold No. 1 as executors but are assigning Nos 2 and 3 in their individual capacity, because both in the recital of the agreement for sale and in the operative part of the deed, a distinction is drawn between the several properties, and the purchase money for the properties belonging to the testator is kept distinct from the consideration—I do not know whether there was any purchase money—for the assignment of the leaseholds Nos. 2 and 3.

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(1) [1894] 2 Ch. 101.
(2) [1908] 2 Ch. 356.

The third point was the point made by Mr. Riviere, that it appears from one of the recitals in the deed that leasehold No. 1 had been deposited by the executors with the Bank for the purpose of creating a charge to secure the repayment to the Bank of moneys overdrawn by the vendors on their account with the Bank. All I can say is that there is nothing whatever in that recital to suggest that the account which was to be secured by the deposit of the leasehold was not an account of the vendors as executors, but an account in their individual capacity.

The fourth and last point was this, that if one looks at the 1923 deed it will be found that the seal of the purchasers, the company, was affixed in the presence of two directors, and that one was Mr. S. J. Parker, who was one of the executors. With reference to this point Maugham J. said this: " An independent purchaser from executors would not be at all unlikely to insist on one of the vendors, even though an executor, becoming a director of the new company for a time." I entirely agree with the learned judge that there is nothing in that circumstance to put Judkin upon inquiry.

Each one of these four matters seems to me individually quite insufficient to put the purchaser upon inquiry, and I entirely agree with Lawrence L.J., that if each one of them, standing by itself, is insufficient to put the purchaser upon inquiry, he is not put upon inquiry by the fact that they all four occur together in the same document.

Appeal dismissed.

Solicitors: *Mills, Lockyer, Church & Evill; Hamlins, Grammer & Hamlin, for Williams & Kingston, Northampton; Stow, Preston & Lyttelton, for Evershed & Tomkinson, Birmingham.*

W. I. C.

CLAUSON J.

1930

Nov. 6, 7, 10, 11, 12.

SOUTH LONDON GREYHOUND RACECOURSES, LIMITED *v.* WAKE.

[1929. S. 3883.]

Company—Share Certificate—Register of Members—Fraudulent Issue of Certificate by Director—Estoppel—Rectification of Register.

The A. company, of which D. was a director and G. was the secretary, being debtors of W. who, on April 23, 1928, had issued a writ to enforce payment of the debt, procured the issue to W. of a certificate No. 528, certifying that W. was the registered holder of 2000 preferred ordinary shares numbered 40,652 to 42,651 of ten shillings each fully paid in the plaintiff company, which certificate, early in May, 1928, was accepted by W. as security for the payment of the debt and on the faith of which W. abstained from serving the writ upon the A. company until June 18, 1928. D. was also managing director and G. was also secretary of the plaintiff company. The certificate bore the seal of that company, and was attested by the signatures of D. and G. as such director and secretary respectively.

The plaintiff company having refused to recognize W.'s title to the shares brought this action against W., in which they claimed a declaration that W. was not entitled to the shares and rectification of their register of members.

By article 105 of the articles of association of the plaintiff company it was provided as follows: "The seal of the company shall not be affixed, except by the authority of a resolution of the board of directors and in the presence of at least one director and the secretary; and the said one director and the secretary shall sign every instrument to which the seal shall be so affixed in their presence and in favour of any purchaser or person bona fide dealing with the company such signature shall be conclusive of the fact that the seal has been properly affixed."

The following further facts were held to have been established at the trial: from entries in the register of members it appeared that the shares in dispute had in November, 1927, been issued, with other shares, to the English and Foreign Investment Trust, Ld., and that in respect of those shares three shillings per share were paid up. There was no entry showing when that company ceased to be a member. There were entries in the register indicating that the 2000 shares were transferred to W., and that W. was entered on the register as a member on April 30, 1928, as having acquired the shares as fully paid and as having had a certificate No. 528 issued to him. There was no record of any transfer from the English and Foreign Investment Trust, Ld. In April, 1928, while the register and seal of the plaintiff company were under their physical control, D. and G. made the entries in the register, and, as director and secretary respectively of the plaintiff company, affixed the seal of that company to and signed the certificate issued

CLAUSON J.

1930

South London Greyhound Racecourses, Ld. v. Wake.

to W., but without any authority from the plaintiff company and fraudulently in the interest of the A. Company:—

Held, that the certificate not having in truth been sealed by the plaintiff company's authority, was, in the circumstances aforesaid, a forgery and not binding upon the company. The principle of *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439 applied.

W., whose ignorance of article 105 had been proved, was, on that account, precluded from relying on that article to support the contention that the plaintiff company was bound in his favour to treat the attesting signatures as conclusive evidence of the fact that the seal of the plaintiff company had been properly affixed to the certificate.

As affixing the seal was not a matter in which normally a single director would have power to act without the authority of the board of directors, W. was not relieved from the obligation to inquire whether the formalities required by the article had been complied with.

Witness Action.

In the month of March, 1928, the defendant in this action, Mr. Frederick C. Wake, entered into a contract with a company called the St. Aubin's Development Trust, Ld., under which a deposit was payable to him. Mr. Ernest Devereux was a director of the St. Aubin's Company and Mr. J. A. Greene was the secretary, and it appeared that Devereux acted as the representative of that company in negotiating and carrying through the contract with Wake.

The St. Aubin's Company having failed to pay a sum of 1175*l.*, which was the balance of the deposit, Wake, on April 23, 1928, issued a writ to enforce payment of the debt. He met Devereux, and about the end of April, 1928, it was arranged between them that certificates for shares in the South London Greyhound Racecourses, Ld., to the nominal value of 1000*l.*, should be deposited with Wake not later than May 31, 1928, together with a blank transfer thereof, Wake giving an undertaking that he would not attempt o deal with the same, provided the balance (1175*l.*) of the deposit was paid by that date, and also undertaking to hold over service of the writ until May 31, 1928.

In addition to the offices they held in the St. Aubin's Company Messrs. Devereux and Greene were the managing director and the secretary respectively of the plaintiff company.

On April 30, 1928, Greene as secretary of that company sent to Wake a document, which purported to be a certificate for 2000 shares in the South London Greyhound Racecourses, Ld., numbered 40,652 to 42,651; it was in the usual form, certifying that the defendant Wake was the registered proprietor of 2000 shares on which—as appeared on the face of the certificate—the sum of 6*s*. 6*d*. per share had been paid. It purported to be given under the common seal of the plaintiff company on April 30; there was an impression of a seal, which appeared to be the seal of the South London Greyhound Racecourses, Ld.; it was signed by Devereux and by Greene, and it was not disputed that what appeared to be the signatures of Devereux and Greene were in fact their signatures. On the back of the certificate there was an indorsement: "The sum of 3*s*. 6*d*. per share was paid on the (blank) of (blank) and the shares are now fully paid up." That indorsement had been struck out, and the words "fully paid" written across that indorsement, and that was signed by Greene, the secretary of the plaintiff company, whose signature was admitted to have been his genuine signature. After considerable correspondence between Wake and the plaintiff company, through their respective solicitors, Wake, early in May, 1928, acquiesced in accepting that certificate as sufficient security on the shares, and on the faith of receiving that certificate he abstained from serving the writ upon the St. Aubin's Company until June 18, 1928.

On the register of members of the plaintiff company Wake in fact appeared as the holder of 2000 shares fully paid up, being the shares the numbers of which appeared on the certificate. As regards those shares and the circumstances in which the certificate was issued Clauson J. found the facts to be as follows: those 2000 shares with others were issued by the plaintiff company in the month of November, 1927, to a company called the English and Foreign Investment Trust, Ld. That was a company of which Devereux was a director and Greene was at the material times secretary. On the shares so issued at that date three shillings per share were paid. The issue of those shares was recorded in the register, in which there was an entry, which seemed to show that in January, 1928, the English and Foreign Company paid 1000*l.* in respect of some liability on some shares. But there was no evidence to show that that sum was either intended to be appropriated or was in fact appropriated by any one, whether payer or receiver, to the particular 2000 shares in dispute in the action. So far therefore as the page in the register was concerned on which the name of the English and Foreign Company appeared, it seemed that three shillings only had been paid upon those shares.

There was no entry on the register showing the date on which the English and Foreign Company ceased to be a member in respect of these shares, as was required by s. 95 of the Companies Act, 1929. What did appear on the register were certain entries made in black ink under the heading "Shares Transferred," which seemed to show that these 2000 shares—the numbers being stated—were transferred, and transferred under circumstances which resulted in a certificate numbered 528 being issued, and it appeared that Wake was entered under date April 30, 1928, as having acquired the 2000 shares in question—the numbers being stated—as fully paid shares, and having had a certificate numbered 528 issued to him. Wake never signed any transfer. There was no record that any transfer of those shares was ever before the board of directors or passed by their board. There was no evidence that any transfer of those shares, whether in writing or, if it were possible, in any other way, was ever made by the English and Foreign Company. The English and Foreign Company never transferred those shares directly or indirectly to Wake. During the month of April, 1928, the share register of the plaintiff company was in the physical control of Devereux and Greene, and the seal of the company was also in their physical control In the month of April, 1928, Devereux and Greene made the entries which appeared in the register of the plaintiff company, which indicated a transfer of the 2000 shares, and indicated that Wake became the holder of those shares as fully paid shares. In fact they made those entries without any authority of any sort or kind from the board of the plaintiff company and untruthfully, the entries being so framed as to

CLAUSON J.

1930

South London Greyhound Race-courses, Ld. v. Wake.

represent that a transfer had in fact taken place which in fact never did take place.

Further, the certificate which was sent to Wake was signed by Devereux and Greene, describing themselves as director and secretary respectively of the plaintiff company, as in fact they were, and the seal of the company was procured by them to be affixed to the certificate without any authority from the board of the plaintiff company and fraudulently in the interests of the St. Aubin's company and in order to enable them or to enable Devereux as the representative of the St. Aubin's company to induce Wake to think that he was in possession by way of security of the 2000 shares in question.

On April 3, 1929, by a letter of that date, Wake wrote to the plaintiff company expressing his surprise that he had not been supplied with a report of the annual general meeting held a considerable time ago and asking to be supplied as a shareholder with a report. On April 11, 1929, the secretary of the plaintiff company replied by asking Wake to furnish him with particulars of the shares he held and alleging that there was no record in the books of the company of any transfer deed of shares into Wake's name. On April 15 and May 23, 1929, Wake replied that he held the plaintiff company's certificate No. 528 for 2000 fully paid preferred ordinary shares of 10*s*. each numbered from 40,652 to 42,651 given under the common seal of the company and signed by Devereux and Greene, those shares having been allotted to him on April 13, 1928, by the St. Aubin's company in respect of moneys owing to him by that company.

In consequence of Wake's claim to be the registered proprietor of those shares, the plaintiff company brought this action, in which they alleged that the entry in their share register of the 2000 shares to the credit of Wake under date April 30, 1928, was unauthorized by the plaintiff company, that no moneys were received in respect of those shares from Wake, that no application for the shares was made by him nor was there any letter of renunciation in his favour lodged with them or any transfer of those shares to Wake and that all the preferred ordinary shares were applied for and allotted before April, 1928. They further alleged that the St. Aubin's company had no authority on April 13, 1928, or at all to allot the shares, and that neither Devereux nor Greene had their authority to sign the share certificate or to affix the seal of the company thereto. The plaintiff company claimed a declaration that Wake was not entitled to the shares in question, that the same were not fully paid, and that Wake's name was improperly entered on the register of members of the company. They also claimed rectification of the register and further ancillary relief.

By his defence Wake denied that all the shares in the plaintiff company had been allotted before April 30, 1928, and did not admit that the St. Aubin's company had no authority to allot the 2000 shares to him. He further alleged that the plaintiff company were estopped from denying that the shares were properly registered in his name and were fully paid. He counterclaimed that, if the allotment of the 2000 shares to him and the entry on the register and the execution and issue to him of the certificate were in fact invalid, the plaintiff company by their negligence or acquiescence misrepresented to him that the same were valid and that he was misled by and relied upon such misrepresentation and thereby suffered damage, and he claimed a declaration that he was and had since April 30, 1928, been a member of the plaintiff company in respect of the 2000 shares and that those shares were fully paid or, in the alternative, damages.

Fergus Morton K.C. and *Ernest G. Palmer* for the plaintiff company. The certificate is only prima facie evidence of Wake's title to the shares: Companies Act, 1929, s. 68. The issue of the certificate was not the act of the company. Its issue was never authorized by them: no resolution was passed authorizing Devereux to affix the company's seal to the certificate. The false representation by Devereux that he had the company's authority to affix their seal to the certificate is sufficient to support a plea of non est factum.

The shares were registered in the name of the English and Foreign Investment Trust Company, who never in fact transferred them to Wake, but still remain the registered holders of them.

A. F. Topham K.C. and *A. C. Edgar* for the defendant. The plaintiff company by issuing the certificate to Wake, which actually bore the seal of the company and was attested by the genuine signatures of the company's managing director and secretary, represented to Wake that he was the owner of the 2000 shares which he might sell in the market to persons who might desire to become the registered holders: the company is thereby estopped from denying the truth of their representation: *Balkis Consolidated Co.* v. *Tomkinson* (1); *Hart* v. *Frontino, &c., Gold Mining Co.* (2) The company's register is prima facie evidence of the truth of the entries in it: Companies Act, 1929, ss. 95 and 102. It contains an entry of a transfer of the particular shares formerly held by the English and Foreign Company to Wake, whose name is registered as the holder of those shares, the truth of which entries has not been displaced by the evidence. There is no proof that those entries were wrongfully made or not genuine or that there was no transfer of the shares in fact. The Court should presume from the circumstances an arrangement between the St. Aubin company and the plaintiff company, of both which companies Devereux was a director, to dispense with the execution of a formal transfer of the shares to Wake: *In re Taurine Co.* (3) The plaintiff company have admitted by their entries in the register that those shares were transferred to Wake and were paid for in full. They were authorized by article 105 to delegate to Devereux the power of affixing their seal to the certificate and Wake was entitled to assume that the certificate was regular in all respects, as ex facie it appeared to be: *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England* (4); *In re Barned's Banking Co.* (5) In face of the admission of a transfer and the issue of the certificate, intended to be acted upon, the plaintiffs were estopped from denying Wake's title to the shares: *In re Bahia and San Francisco Ry. Co.* (1) The plaintiffs by article 105 and the certificate held out Devereux as their authorized agent for the purpose of affixing their seal to the certificate. Here, Wake is on the register, and the right to damages only arises when he has been struck off the register; until he is taken off, the plaintiffs cannot, in face of the certificate, be heard to say that Wake is not a shareholder. Wake is merely asking the Court not to interfere. Nor can the plaintiffs contend that the shares are not fully paid, as the certificate represents that they are: *In re British Farmers Pure Linseed Cake Co.* (2), per Lord Blackburn in *Burkinshaw* v. *Nicolls.* (3)

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(1) [1893] A. C. 396.
(2) (1870) L. R. 5 Ex. 111.
(3) (1883) 25 Ch. D. 118, 132.
(4) (1887) 21 Q. B. D. 160, 162, 163.
(5) (1867) L. R. 3 Ch. 105, 116.

Sect. 74 of the Law of Property Act, 1925, provides that in favour of a "purchaser"—which expression by s. 205, sub-s. 1 (xxi.), includes a person who for valuable consideration acquires an interest in property—a deed shall be deemed to have been duly executed by a corporation aggregate, if its seal be affixed thereto in the presence of and attested by its secretary and a director. The new law dispensed therefore with the necessity for Wake to inquire whether the formalities required by article 105 had been complied with.

[Clauson J. I am not prepared to hold that this share certificate is a deed within the meaning of that section.]

Morton K.C. replied. By s. 95 of the Companies Act, 1929, the plaintiffs were bound to keep a register of their members, with certain particulars, including the date when any member ceased to be a member, and by s. 100 they may apply to have the register rectified. Wake knowing that he had not executed a transfer must have imputed to him knowledge that no transfer had been executed in his favour, with the result that he must be taken to have known that

(1) (1868) L. R. 3 Q. B. 584.

(2) (1878) 7 Ch. D. 533.

(3) (1878) 3 App. Cas. 1004, 1027.

Note.—In *The Queen* v. *Morton* (1873) L. R. 2 C. C. 22 there is a dictum of Bovill C.J. that a share certificate is not a deed; see p. 27.

the representation made by the certificate was not true: *Parbury's* case. (1) In the absence of the delivery to the plaintiffs of a proper instrument of transfer, they were not entitled to register a transfer to Wake: s. 63 of the Companies Act, 1929. The plaintiffs are not estopped by the issue of the certificate bearing their seal from proving that it is a forgery, which the evidence shows that it is. True it is that the certificate actually bears the impression of the plaintiffs' seal, but as Lord Macnaghten said in *Ruben* v. *Great Fingall Consolidated* (2) "the representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery." The fact that in that case the signatures of the two directors were forged does not prevent the principle of the decision in that case from applying here, where the sealing was unauthorized and fraudulent. The fact that certain formalities are required by article 105 for affixing the company's seal is sufficient to distinguish the present case from *In re Barned's Banking Co.* (3) No negligence on the part of the plaintiffs has been proved which would estop them from saying that the certificate was not their own act: *Mayor, &c., of Merchants of the Staple of England* v. *Governor and Company of Bank of England.* (4) It has been proved affirmatively that Devereux, as director, had no authority to act for the plaintiffs and therefore the plaintiffs are not responsible for the issue of the certificate: *D'Arcy* v. *Tamar, Kit Hill and Callington Ry. Co.* (5) Wake did not, relying on the certificate, alter his legal position or rest satisfied, thereby suffering loss. What really induced him to hold up the action he had commenced to recover the debt owed him by the English and Foreign Company was a promise to pay the debt, and was not the security of the share certificate: *Dixon* v. *Kennaway & Co.* (6); *Simm* v. *Anglo-American Telegraph Co.* (7) In view of the evidence given by him of his ignorance of the existence of article 105 Wake cannot be allowed to rely upon that article for the purpose of validating the transaction: per Sargant J. in *Houghton & Co.* v. *Nothard, Lowe & Wills.* (1) Even if he were entitled to rely on the article, it would have been his duty, in the special circumstances, to satisfy himself that a resolution of the board of directors had been passed, by which power to affix the seal of the plaintiffs to the certificate had been delegated to Devereux: *Kreditbank Cassel G.M.B.H.* v. *Schenkers, Ld.* (2)

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(1) [1896] 1 Ch. 100, 105, 106.
(2) [1906] A. C. 439, 444.
(3) L. R. 3 Ch. 105, 116.
(4) 21 Q. B. D. 160.
(5) (1867) L. R. 2 Ex. 158.
(6) [1900] 1 Ch. 833.
(7) (1879) 5 Q. B. D. 188, 211.

Topham K.C. replied on the cases. Wake was under no obligation to read the articles, but he is entitled to be treated as in the same position as if he had read article 105: he would, in that case, have known that the plaintiffs had power to delegate the duty of affixing their seal. Consequently, with that knowledge, he was justified in treating Devereux, the managing director, as a person held out by the plaintiffs as having their authority to issue the certificate, which he, acting within the scope of his authority, issued. The rule in *Royal British Bank* v. *Turquand* (3) applies to a case like the present where Devereux was doing something which Wake believed, and with reason, he had power to do. Here, there is nothing abnormal in the seal of the plaintiffs having been affixed by a single director. Wake was under no obligation to satisfy himself by inquiry that the formality of passing a resolution delegating that power to Devereux had been complied with: per Atkin L.J. in *Kreditbank Cassel G.M.B.H.* v. *Schenkers, Ld.* (2) As to *Ruben* v. *Great Fingall Consolidated* (4) there is some distinction between the facts of that case and those of the present case. There not merely was the seal of the company fraudulently affixed, but the signatures of the two attesting witnesses were also forged, while here the signature of the managing director was a genuine one.

CLAUSON J. [after stating the facts]: In this action the plaintiff company are asking that the register should be

(1) [1927] 1 K. B. 246, 266.
(2) [1927] 1 K. B. 826, 844.
(3) (1856) 6 E. & B. 327.
(4) [1906] A. C. 439, 444.

rectified by striking out the defendant Wake's name as the holder of the 2000 shares and, incidentally, for delivery up of the certificate to which the seal of the company has been affixed under the circumstances which I have stated and found to be proved.

I conceive that if the certificate is binding on the company in the sense of being a document which has, in truth, been sealed by the company, whether by a duly authorized agent or by a person whom the company cannot be heard to allege to be other than a duly authorized agent, it may well be that the certificate estops the company from setting up the true facts and from alleging that Wake never became transferee of the shares and accordingly has no title to them; and if that were the case, I conceive I should be bound to refuse the company the relief it asks.

If the certificate were binding on the company, but Wake were not on the register and were now asking to be put on the register, the position would or might be different. In such a case it would be necessary for me to consider whether the person who holds the certificate, the validity of which the company is estopped from denying, can claim to be put on the register though he has never in fact become a shareholder. In such a case the observations of Herschell L.C. in the case of the *Balkis Consolidated Co.* v. *Tomkinson* (1) would require very careful consideration. If, however, the certificate and the register agree—and in this case they do agree—and the person entered on the register is entitled to rely on the certificate as binding on the company, it is not easy to see how the company can succeed in a claim to have that person struck off the register, although it may well be that, if the true owner of the shares—in this case, apparently, the English and Foreign Company—had been a party to the proceedings, the Court would be bound to displace the holder of the certificate in favour of the true owner. However, these questions, which are interesting questions, do not arise until the initial question is answered in the affirmative—namely, is the certificate one which, on

(1) [1893] A. C. 396, 407.

CLAUSON J.

1930

SOUTH LONDON GREYHOUND RACE-COURSES, LD. *v.* WAKE.

the evidence, has been sealed in such circumstances that it must be held to have been duly sealed on the company's behalf?

On the evidence, as it stands, I feel bound to hold that the certificate is not binding on the company, not having been sealed in such circumstances as enable me to hold that it was duly sealed on the company's behalf.

The facts, as they have been proved before me, appear to me to bring the case directly within the principles laid down in *Ruben* v. *Great Fingall Consolidated.* (1) If I felt any doubt about it, that doubt would be removed by a statement of the law contained in the judgment of Atkin L.J. in *Kreditbank Cassel G.m.b.H.* v. *Schenkers, Ld.* (2) In that case the learned Lord Justice said (3): "But we have the authority of the House of Lords in *Ruben's* case (1) for saying that the doctrine that you need not investigate whether or not the conditions regulating the internal management of the company have been strictly carried out in accordance with the articles has no application in the case of a document which is an obvious forgery. In this case the defendants are entitled to say: 'These are not our bills and we are not precluded from denying the authority of the person who purported to sign them on our behalf.'"

In my view on the facts as I have found them, this document must be taken to be a forgery. On reference to the articles of the company, it is plain that, according to the constitution of this company, the seal cannot properly be affixed to a document, so as to bind the company, unless it is so affixed under the authority of the board of directors. It is quite plain in this case that no such authority was ever in fact given. Article 105, which so prescribes, is as follows: "The seal of the company shall not be affixed to any instrument except by the authority of a resolution of the Board of directors and in the presence of at least one director and of the secretary and the said one director and secretary shall sign every instrument to which the seal shall be affixed in their presence." True, it goes on to say: "And in favour of any purchaser or person bona fide dealing with the company such signature shall be conclusive of the fact that the seal has been properly affixed." But I do not understand the latter part of that article in the least to modify the earlier part which makes it essential, in order that a document should be validly sealed, that the seal of the company should be affixed by a resolution of the board of directors. The only effect of the latter part of the article is that a person who has knowledge of the contents of the article and who on the strength of the article deals with a document to which the seal appears to be properly affixed and which is attested by the signatures of a director and the secretary as being a document properly sealed by the company may be in a position to use the article in support of a claim that he was induced to act or abstain from acting by the representation made to him by the company that a document signed by a director and the secretary would not be disowned, and that the company could not as against him be allowed to treat the document otherwise than as a valid document. No such claim can however be set up by the defendant Wake in this case, because beyond question he knew nothing whatever about the article, and neither acted nor abstained from acting by reason of any representation made by the article.

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(1) [1906] A. C. 439.
(2) [1927] 1 K. B. 826.
(3) [1927] 1 K. B. 844.

It is said, however, that notwithstanding the statement of the law which I have cited from *Schenkers'* case (1) I can, consistently with that case, decide that the defendant is entitled to treat this certificate as if it had in fact been sealed by the authority of a resolution of the board of directors. As I understand it, the argument is that the affixing of the company's seal is a matter in which normally a director would have power to act for the company; and it is pointed out—and so far pointed out quite truly—that Atkin L.J. says that, if you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied

(1) [1927] 1 K. B. 826, 844.

CLAUSON J.

1930

SOUTH LONDON GREYHOUND RACE-COURSES, LD. v. WAKE.

with before he exercises that power; but there is no evidence before me even to suggest that the affixing of a company's seal to a document is a matter in which normally a single director would have power to act for the company. It is within common experience that the affixing of the seal is a matter with which the board deals and not a director, and it is commonly so understood. In the case of this particular company the constitution of the company by the article to which I have referred makes it quite plain that the affixing of the seal is not a matter in which normally a director would have power to act for the company. It is specifically laid down by the article that the affixing of the seal is a matter for which the authority of the board of directors and not of a single director is required. Accordingly, I do not see, in the circumstances, as I have found them, how I can avoid holding that this document is a forgery, so far as the affixing of the seal is concerned, that the impression of the seal has been put upon it without any authority of the company, and that this is not a case in which the doctrine can be called in aid that, where the person who takes the document is dealing with a director in a matter in which normally the director would have power to act, he need not trouble about formalities.

I ought to mention one other thing. There is one distinction to be drawn between *Ruben's* case (1) and this present case. In *Ruben's* case (1) it was held that a company was not bound by a document to which the seal had been affixed without authority and on which the signatures of the attesting directors were forged. In the particular case before me the signature of the attesting director is a true signature. It is the affixing of the seal to the certificate which is the element of forgery in this case. I can see no difference in principle between the present case and *Ruben's* case. (1) What I am concerned to see is whether the seal of the company was affixed by the company, by its authorized agent, and whoever affixed the seal in my view cannot have affixed it and did not affix it under any authority of the board of directors.

(1) [1906] A. C. 439.

The result, it seems to me, is that I must hold the certificate to be a forgery; and I do not think it will be denied that, if the certificate is a forgery, and if the circumstances are such that the doctrine referred to by Atkin L.J. in the passage I have read, as to the circumstances under which no investigation need be made as to the observance of formalities, does not apply, the result is that the certificate is a mere nullity. The certificate being a mere nullity, there is nothing in the existence of the certificate to prevent the company from setting up the true facts. The true facts, as I have found them, show that the defendant Wake never became the holder of these shares, that the shares, so far as the information before me goes, always were and continue to this day to be the property of the English and Foreign Company. In these circumstances it is my duty to correct the register and to make it conform with the true facts by striking out Wake's name as the holder of the shares.

It was suggested that there was one further answer which Wake might set up, that he might say that there has been laches, that the company ought to have come earlier, that there has been such laches as precludes the company from now asking for relief. In my view nothing which has occurred prevents the company from coming and claiming that their register be purged. I am not aware of any circumstances having been proved to me which show that there is any reason why the register should not now be brought into conformity with the true facts. In an ordinary case in which a question of laches arises with regard to the rectification of a register—cases where a man's name has been left on the register in such a way that people have given credit to the company because of his name being there—quite different considerations arise. But according to the register in this particular case, Wake appears to be the owner of fully paid shares and no creditors can have been affected by the fact that his name remained on the register. Accordingly I see no reason, so far as that is concerned, why I should not make the order which the company asks.

There will accordingly be an order that the register be rectified by striking out Wake's name as holder of the shares, the numbers of which are stated in the so-called certificate; and, as I hold the certificate to be a forgery, I am prepared to order that it shall be delivered up to the plaintiff company for cancellation by them. I see no reason for making an order declaratory of rights.

After some discussion, in view of pending proceedings by the defendant against other persons in connection with the certificate, it was ordered that, without prejudice to any appeal, the defendant should be at liberty to retain the certificate on his undertaking to mark it with a notice that it had been held in this action to be invalid and also undertaking in the terms of paragraph 4 of the claim in the statement of claim not to deal with it.

Solicitors: *Downer & Lewis*; *Stoneham & Sons*.

H. C. H.

In re MILLER AND PICKERSGILL'S CONTRACT.

CLAUSON J.
1931
Jan. 29.

[1930. M. 391.]

Vendor and Purchaser—Muniments of Title—Statutory Acknowledgment for Production—Sale by Administrator—Letters of Administration—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 36.

In view of s. 36 of the Administration of Estates Act, 1925, which provides for the indorsement, after January 1, 1926, on the probate or letters of administration of notices of assents or conveyances of a legal estate by a personal representative, a purchaser of real estate can now require a vendor to include a probate or letters of administration in such statutory acknowledgment for production and delivery of copies of muniments of title as the vendor may be bound to give.

VENDOR AND PURCHASER SUMMONS.

By a contract in writing dated October 20, 1930, and made between Hugh Cecil Miller of the one part and Lawrence William Pickersgill of the other part, the said H. C. Miller agreed to sell and the said L. W. Pickersgill agreed to purchase at the price of 120*l.* a certain dwelling-house and premises known as 14 Australia Street, Deptford, Sunderland. The contract provided that the vendor should on completion of the purchase, which was fixed for November 17, 1930, give to the purchaser a statutory acknowledgment of his right to the production and delivery of copies of any muniments of title to the custody of which the purchaser was not entitled.

The vendor was selling as the personal representative of Thomas Miller, who died intestate on June 15, 1930, and in respect of whose estate letters of administration were, on September 5, 1930, granted out of the Durham District Probate Registry to the vendor.

The vendor was willing in accordance with the provisions of sub-s. 5 of s. 36 of the Administration of Estates Act, 1925 (1), to have indorsed on the letters of administration notice of the conveyance of the property to the purchaser when executed, and to produce for the inspection of the purchaser's solicitors the letters when so indorsed; but denied the purchaser's right to the insertion in the conveyance of an acknowledgment by the vendor of the purchaser's right to the production of the letters and delivery of copies thereof, on the ground that those letters were not muniments of title within the meaning of the contract.

The purchaser by his summons asked for a declaration that he was entitled to have inserted in the conveyance to him such an acknowledgment as that above mentioned.

Eardley-Wilmot for the applicant. Whatever was the right of a purchaser before the Act of 1925 to a statutory acknowledgment for production of probate or letters of administration, it is submitted that, since the coming into operation of that Act, the effect of s. 36 is to make those documents muniments

(1) Sect. 36, sub-s. 5: "Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto."

of title for the production of which a purchaser is entitled to require the vendor to give him a statutory acknowledgment.

With regard to the rights of a purchaser before the Act of 1925, reference was made to the following: Williams on Vendor and Purchaser, 3rd ed., vol. i., p. 643; *Cooper* v. *Emery* (1); Davidson's Precedents and Forms in Conveyancing, 4th ed., vol. ii., pt. 1, p. 663, note (*a*); Key and Elphinstone's Precedents, 12th ed., vol. i., pt. 1, preliminary note on p. 514; Prideaux's Precedents in Conveyancing, 22nd ed., vol. i., p. 480, note (*h*), and vol. iii., addenda cxxxi.

R. H. Hodge for the respondent.

CLAUSON J. The question I have to determine is one of some interest, and, indeed, I think, in practice, of some considerable importance. Before the Administration of Estates Act, 1925, there was some doubt amongst conveyancers whether, when a title taken by the purchaser on a sale contained, as one of its links, a will or letters of administration which related, as they in most cases would, to other property besides that comprised in the sale, the purchaser was or was not entitled to require the vendor to include the probate or letters of administration in such acknowledgment for production and delivery of copies of muniments as the purchaser, in the circumstances, could demand. The point can be stated thus: Probate and letters of administration are simply copies carried away from the Probate Registry by the executor or the administrator of something which is recorded at the Probate Registry, and the real link in the title would accordingly seem to be, not the probate or the letters of administration, but the will or the grant of administration appearing on record in the Probate Registry. Accordingly it was the view of some conveyancers before the Act of 1925, that it was not necessary for the vendor to comprise in an acknowledgment the probate or letters of administration. Now the Administration of Estates Act, 1925, has become law, and it contains a section, s. 36, which marks a new departure in the law. It contains machinery under which, in certain circumstances, certain notices may be required to be indorsed upon the probate or letters of administration, with the result that certain consequences ensue to persons who claim title through the executor of the will or the administrator, as the case may be. There is no provision in the Act to provide that notices so indorsed on the probate or letters of administration should also be recorded at the Probate Registry. In case the probate or letters of administration should be lost or destroyed difficulty may arise; however, with that I am not now concerned. But it appears to me that the operation of s. 36 of the new Act has, with regard to the matter under consideration, altered the character of the probate or letters of administration. Whereas before the Act it may well be that probate or letters of administration were merely particular solemn copies of documents of record, they have now become something different. It appears to me that, by reason of the notices which they are liable to have indorsed upon them of matters which may form links in the title, the documents themselves have become muniments of title, in the sense of being documents on which the purchaser's title may depend and not merely copies of a record on which that title may depend. Accordingly it appears to me that on principle such documents must now be included in the acknowledgment in cases in which the purchaser is entitled to an acknowledgment relating to the muniments of title. For those reasons the purchaser is, in my view, entitled to the relief he asks by the summons—namely, a declaration that he is entitled to have inserted in the conveyance to him by the respondent, the vendor of the premises comprised in the contract, an acknowledgment by the respondent of the applicant's right to production of the letters of administration.

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(1) (1844) 1 Ph. 388.

Solicitors: *Maude & Tunnicliffe, for Simey, Iliff & Laing, Sunderland; Maples, Teesdale & Co., for Wright, Ellis & Martin, Seaham Harbour.*

H. C. H.

TERRONI AND NECCHI *v.* CORSINI.

[1929. T. 1967.]

MAUGHAM J.

1930

Dec. 5.

Lease—Covenant to repair—Partnership Business on Premises—Reversionary Lease granted to Partners—Agreement for Dissolution and for Sale of Assets to Partners—Date for Completion of Sale—Damages then Recoverable for Breach of Covenant to repair—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 149—*Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.

The plaintiffs and the defendant were partners. One of the partnership assets was the lease of the premises on which the business was carried on, expiring on March 25, 1930. On October 7, 1929, the landlord granted to the three partners a reversionary lease for fourteen years from March 25, 1930, at an increased rent. On October 29, 1929, by an agreement made between the parties for dissolution of the partnership, it was provided that the partnership assets should be sold to the highest bidder of the three partners and proceeds divided, the defendant's share being one-half; also, that the date for completion should be November 18, 1929, and that the defendant should out of his share make certain payments, and should pay the rent under the lease, all rates, taxes and outgoings in respect of the premises, and "all trade debts and other liabilities whatsoever in respect of the said premises and business" down to the date fixed for completion, making these payments out of his share of the proceeds of sale. The agreement came before the Court for construction, and it was declared that the phrase, "other liabilities whatsoever in respect of the said premises," included the liability in respect of damages which the landlord could, on November 18, 1929, have recovered for breach of the repairing covenants in the lease. On an application for a decision whether at that date the damages recoverable by him in respect of non-repair were to be estimated on the basis of the depreciation in market value of the reversion expectant on the determination of the lease, or of that expectant on the determination of the reversionary lease:—

Held, that the "reversion" was the immediate reversion expectant on the lease, and that the fact that a reversionary lease had been granted, to take effect at a date after the date for the assessment of damages, was immaterial.

Joyner v. *Weeks* [1891] 2 Q. B. 31 followed.

ACTION.

On October 29, 1929, Pietro Terroni and Roberto Necchi (hereinafter called "the plaintiffs"), and Pietro Corsini (hereinafter called "the defendant") were entitled, under a lease dated June 23, 1909 (hereinafter called "the lease"), for a term of years expiring on March 25, 1930, to premises known as 9 Crown Court, Pall Mall, and to the goodwill and assets of the business of confectioners and refreshment house proprietors there carried on, in the following shares, the plaintiffs to one-quarter each and the defendant to one-half. They were entitled also to a reversionary lease for fourteen years from March 25, 1930 (hereinafter called " the reversionary lease "), at an increased rent, which the landlord had agreed to grant, and which was in fact granted to them jointly before the date of this action.

By an agreement dated October 29, 1929, and made between the plaintiff Terroni of the first part, the plaintiff Necchi of the second part, and the defendant of the third part it was agreed (inter alia) (1.) that the reversionary lease should be taken up forthwith; (2.) that before the reversionary lease was taken up the lease and reversionary lease and the goodwill and other assets of the said business should be offered for sale by auction to the parties thereto in accordance with the conditions of sale thereunder written; (3.) that the proceeds of the said sale should belong as to one-half to the defendant, as to one-quarter to the plaintiff Corsini, and as to one-quarter to the plaintiff Necchi; (4.) that the defendant should on completion of the said sale pay to the plaintiff Terroni the sum of 128*l.* 11*s.* 4*d.*, and to the plaintiff Necchi the sum of 38*l.* 11*s.* 4*d.* in respect of a sum of 30*l.* per annum agreed to be paid to each of the plaintiffs as the agreed share of the plaintiffs respectively in the profits of the said business, and should also pay and discharge the rent payable under the lease, and all rates, taxes and outgoings payable in respect of the said premises and all trade debts and other liabilities whatsoever in respect of the said premises and business down to the date fixed for completion by the said conditions of sale; and (5.) that the defendant's share in the proceeds of the said sale should stand charged with the payment of the amounts payable by him under clause 4 thereof. The agreement came before the Court for construction on October 31, 1930, and Maugham J. made a declaration that the phrase " other liabilities whatsoever in respect of the said premises " included the liability in respect of damages which the landlord could have recovered at the date fixed for completion for breach of the covenant to repair in the lease of June 23, 1909, the date fixed for completion being November 18, 1929.

The question was then raised whether at that date the landlord could have recovered damages in respect of non-repair estimated on the basis of the amount by which the reversion expectant on the lease had depreciated in market value, or on the basis of the amount by which the reversion expectant on the determination of the reversionary lease had depreciated in market value.

Henry Johnston for the plaintiff. The effect of s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927 (1), in such a case as the present is that the amount of damage is practically nil. "Reversion" means the then existing reversion, and the question here is whether the damages which have accrued by reason of the breach of covenant exceed the value of the reversion at that date: *Joyner* v. *Weeks*. (2)

Lawrence Tooth for the defendant. The question arising under s. 18, sub-s. 1, is, what is the reversion at the time when the landlord brings his action, and how much has it been damaged? In the ordinary case where there is a lease and the landlord brings his action, he has the fee simple subject to the lease, but in this case a reversionary lease was granted, and the real point to be decided is the effect of the reversionary lease. At the date of the decision in *Joyner* v.

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(1) Sect. 18, sub-s. 1: "Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement."

(2) [1891] 2 Q. B. 31.

Weeks (1) "interesse termini" existed, but "interesse termini" has been defined as a mere right. Under s. 149 of the Law of Property Act, 1925 (2), it has ceased to be a mere right; the interest of reversionary lessees is now a legal right, and the reversion is the fee simple subject to two legal terms. Damages in the present case are to be assessed upon the basis of the fourteen years' term, because that is the only term which the landlord has when he brings his action for damages. The object of s. 18 of the Landlord and Tenant Act, 1927, is to provide a uniform rule in all cases, instead of the artificial rule in *Joyner* v. *Weeks*. (1) That act has modified the right on the covenant to repair in every case. If the landlord in the present case brings his action he has to satisfy the Court that the reversion—i.e., the fee simple, subject to two legal terms—has been damaged. As to damages, the plaintiff can put before the Court everything that he has suffered from the breach, but it must be shown to flow from the breach; and the Court, in assessing damages, will hold that the reversion is postponed for fourteen years, because there is no other reversion, and under the Landlord and Tenant Act, 1927, the amount of damages is to be the diminution in value of the whole of the reversion.

Henry Johnston in reply. The reversion at the time when the action was brought was the fee simple expectant on the determination of the lease.

MAUGHAM J. This point, which arises on an order made by me on October 31 last, is somewhat puzzling. The order which I made involved an inquiry as to what was the amount which the lessor could on November 18, 1929, have recovered against the lessee for damages. [His Lordship then stated the facts, read s. 149 of the Law of Property Act, 1925, and s. 18 of the Landlord and Tenant Act, 1927, and continued:] I would observe that the question of the measure of damage for breach of covenant to repair has been the subject of many decisions, some of which before the date of the coming into force of the Landlord and Tenant Act, 1927, had led to an unjust state of affairs, because landlords were entitled to receive large sums from tenants at the expiration of the leases in respect of worthless properties which they immediately pulled down. It is true to say that the question of the damages in the case where the action is brought during the term was well settled by decisions: the amount being, not that required to put the premises in repair, but that by which the reversion was depreciated in value. Accordingly, it may be said that, in regard to an action brought during the term for damages for breach of covenants to repair, s. 18, sub-s. 1, of the Act of 1927 does very little, if anything, to limit the damages recoverable, while, on the other hand, the damages recoverable if the action is brought at the expiration of the term may no doubt be diminished by reason of the provision of the sub-section, the latter part of which has a most material effect on the damages which a landlord may recover. The question here is whether the word "reversion" refers to the reversion on the lease irrespective of the reversionary lease granted before the date of the assessment of damages, or whether, as the doctrine of interesse termini has been abolished, and the reversionary lease created a term of years effective in law and equity as from March 25, 1930, I ought to regard the word "reversion" as meaning reversion expectant on the determination of the reversionary lease.

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(1) [1891] 2 Q. B. 31.

(2) Sect. 149, sub-s. 1: "The doctrine of interesse termini is hereby abolished."

The point is not easy to determine, but in my judgment, the "reversion" is the reversion immediately expectant on the lease irrespective of that expectant on the reversionary lease. The former, I think, is the "reversion" indicated in s. 18, sub-s. 1, of the Landlord and Tenant Act, 1927, and I do not think that the fact that a term of years has been created to take effect from March 25, 1930 (a future event at the date when damages must be assessed), affects the question.

I come to that conclusion with some reliance on *Joyner* v. *Weeks*. (1) In that case the plaintiff as lessor was suing upon a covenant contained in a lease by which the defendant as lessee covenanted to leave the demised premises in repair. While the term was running, the plaintiff made a demise of the premises to a third person to take effect from the termination of the lease to the defendant, and that demise contained a covenant to pull down and alter the premises. The official referee to whom the matter was referred found that the plaintiff in the circumstances had suffered no loss, and gave judgment for the plaintiff for one farthing. The Court of Appeal, however, took a different view, and held that the correct measure of damages was the cost of putting the premises into the state of repair required by the covenant, and that this was not affected by the grant of a subsequent lease to another lessee from the expiration of the defendant's term. The value of that decision is less than it was, because the doctrine of interesse termini has been abolished : but the decision of the Court of Appeal is based, not only upon that doctrine as then extant, but also upon the ground that the covenants contained in the subsequent lease in force at the date when the plaintiff's right of action arose, but unperformed at that date, could not be held to take away or modify that right. In that connection I would add that it was not certain on November 18, 1929, that the tenants under the lease would perform the covenants. They might not have done so and the landlord might have re-entered a few days after that date. On these grounds I am of opinion that the plaintiffs succeed.

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(1) [1891] 2 Q. B. 31.

Solicitors : *G. D. Freeman & Son ; Saville & Mannooch.*

K. R. A. H.

In re TOMLINE'S WILL TRUSTS.

PRETYMAN *v.* PRETYMAN.

[1931. T. 101.]

MAUGHAM J.

1931
Jan. 29.

Will—Construction—Bequest of Chattels including "books" as Heirlooms—Manuscript Letters inlaid into Sheets bound in Volumes—Meaning of "book."

A testator by his will made a settlement of his two mansion houses and then bequeathed "all the pictures prints statues sculptures articles of vertu books furniture and plate in my mansion houses . . . . unto my trustees upon trust to allow the same (hereinafter called 'the said heirlooms') to be used and enjoyed" as in the will mentioned. Included in the testator's estate were 155 original manuscripts of the series of letters and papers known as the Paston letters. All the originals of the series had belonged to Sir John Fenn, who, towards the end of the eighteenth century, had had these 155 letters inlaid into sheets of paper, which he had then had bound in three volumes. The testator had acquired them so bound, and they were still so bound at the date of his death. On a summons on behalf of the tenant for life under the settlement asking whether the 155 letters were included in the chattels settled by the will to devolve as heirlooms or formed part of the testator's residuary estate, and, if the answer to the first part of the question was in the affirmative, that the tenant for life might be authorized to sell them:—

Held, that the three volumes containing the MSS. of the Paston letters passed under the will as heirlooms under the word "books."

In re Plowden (1908) 24 Times L. R. 883; *Willis* v. *Curtois* (1838) 1 Beav. 189; and *In re Barratt* (1915) 31 Times L. R. 502 followed.

In re Masson (1917) 86 L. J. (Ch.) 753 distinguished.

In re Baroness Zouche [1919] 2 Ch. 178 considered.

Observations on the meaning of "articles of vertu."

SUMMONS.

By his will, dated May 13, 1889, George Tomline (hereinafter called "the testator") appointed executors and trustees thereof whom he also appointed to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1887, and devised and bequeathed his mansion houses to the uses therein mentioned. By clause 12 of the will he bequeathed "all the pictures prints statues sculptures articles of vertu books furniture and plate in my mansion houses at Orwell Park and Riby Grove aforesaid unto the trustees hereinbefore named their executors and administrators upon trust to allow the same (hereinafter referred to as 'the said heirlooms') to be used and enjoyed so far as the law will permit by the person or persons who under the limitations hereinbefore contained shall for the time being be in the actual possession or in the receipt of the rents and profits of the said hereditaments and premises hereinbefore devised in settlement, but so that such heirlooms shall not vest absolutely in any person hereby made tenant in tail male by purchase who shall not attain the age of 21 years, but on the death of such person under the age of 21 years shall go and devolve in the same manner as if they had been freehold hereditaments of inheritance and had been included in the devise in settlement hereinbefore contained." By clause 14 of the will he bequeathed "all my money securities for money goods chattels and personal estate not hereinbefore otherwise disposed of unto the trustees hereinbefore named . . . . upon trust to sell call in and convert into money such parts thereof as shall not consist of money . . . . and to stand possessed of the residue of the said money upon trust to lay out the same from time to time as opportunity shall offer in the purchase of lands and hereditaments situate in the county of Suffolk . . . . to be . . . . conveyed assured or surrendered to uses and upon trusts similar to or corresponding with the uses and trusts hereinbefore limited and declared concerning . . . . hereditaments in the county of Suffolk hereinbefore devised in settlement."

The testator died on August 25, 1889. Included in the chattels at one of the testator's mansion houses in the will mentioned were 155 of the original manuscript letters of the series known as the Paston letters. In the latter part of the 18th century the originals of the Paston letters belonged to Sir John Fenn, who edited and published them. Sir John Fenn inlaid the letters, which afterwards belonged to the testator, into sheets of paper, which he had bound into three volumes. They remained in that condition at the date of the testator's death and also at the date of this summons, by which the tenant for life under the settlement contained in the will asked that it might be determined whether upon the true construction of the will such of the originals of the Paston letters as were comprised in the testator's estate were included in the chattels which by the will were settled so as to devolve as heirlooms, or whether they formed part of his residuary personal estate; and, if they were included in the chattels so settled as aforesaid, that the plaintiff might be authorized to sell them in such manner and subject to such conditions and provisions as he might think fit.

Rawlence for the summons. It cannot be suggested that these manuscripts are "books" just because they have been mounted and bound. They have existed separately for hundreds of years. A stamp album is not a "book." [He referred to *In re Baroness Zouche.* (1)] There have been several cases on the meaning of the word "book." The most relevant is *In re Masson* (2); see also *Willis* v. *Curtois* (3) and *In re Plowden.* (4) In the present case the actual manuscripts are not bound up in book form, but are merely mounted: *In re Barratt.* (5)

David Farrer for the remaindermen. The letters do not pass under the bequest of heirlooms, but go to the trustees upon trust for sale.

J. V. Nesbitt for the trustees. The question is one of construction of this particular will. The testator made a gift of heirlooms, which he settled to devolve with his real estate for as long a period as the law allowed. It is quite clear on the authorities that these volumes are books, and have been so since the year 1777. That being so, and having regard to the form of the gift, it can be held that the word "books" in this gift does include these particular books. In *In re Baroness Zouche* (1) P. O. Lawrence J. (as he then was) did say that he thought that an article, to be an article of vertu, must possess some artistic merit. But, quite apart from that, the volumes in the present case come under the word "book."

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(1) [1919] 2 Ch. 178.
(2) 86 L. J. (Ch.) 753.
(3) 1 Beav. 189.
(4) 24 Times L. R. 883.
(5) 31 Times L. R. 71; 502.

MAUGHAM J. [having stated the facts :] The apparently simple question is whether such of the originals of the Paston letters as were comprised in the estate of the testator pass as heirlooms or fall into residue. In order to determine that it is of vital importance to appreciate the facts in relation to the letters in question. The testator owned 155 of the original manuscript letters in question, but he did not own them in the form of letters included in portfolios or kept in a safe. The evidence shows that in the latter part of the 18th century the originals of the present letters belonged to one Sir John Fenn, by whom they were edited and published; and Sir John Fenn caused them to be mounted, or rather inlaid, in sheets of paper, and then had the sheets of paper bound up into three volumes, and that is the condition in which they remained at the time of the testator's death, and still remain. The three volumes are present in Court, and I have examined them with great interest. The first one, which is now before me, is in the form of an oblong book half bound in old calf, and on the inside of the binding I find the signature of John Fenn and the date 1777, and what is undoubtedly the bookplate of Sir John Fenn. The book is described on the binding as "MS. letters Henry VI., Volume 1," and then there follow the dates, 1440 to 1460. Inside that volume I find this inscription : "Original MS. letters, written during the reigns of Henry VI., Edward IV., and Richard III., in three volumes. Volume I. : This volume contains all the original MS. letters, being 53 in number, written during the reign of Henry VI. from 1440 to 1460, which are printed in the first quarto volume, published in 1787, from page 1 to page 214, and which are there illustrated with notes historical and explanatory." I pause there to say that that is a reference to the first volume of Sir John Fenn's edition of the present letters. Then the inscription goes on : "All the original letters in this collection which are here placed in chronological order were written by various persons of rank or consequence," and so on. He signs it, "John Fenn." Then in the volume of the book, if it is a book, I find a number of sheets of paper in which, sheet by sheet, there are inlaid, and so skilfully that it seems to be almost as if the letter was part of the sheet in which it is inlaid, 53 original manuscript letters, part of the series known as the Paston letters. Accordingly, there are a number of sheets, in fact some 54 or 55 sheets, because one or two of them are blank, including the end papers, and on each side of the sheet it is possible to read a portion or the whole of a Paston letter because, being inlaid in the sheet, the letter is visible or readable on both sides of the paper in which it is inlaid. There are, as I have already said, three volumes. I need not say anything about the very great interest and the substantial value of these three volumes owned by the late Mr. Tomline when he made his will, but I think that it is obvious that, if he had been asked the question whether he desired these three remarkable volumes to be sold as part of his residuary estate and the proceeds to be invested in land, or whether he would prefer that they should pass as chattels under the clause to which I have referred, nobody can entertain a doubt that his answer would have been in favour of the latter alternative.

Apart from that consideration to which, it may be, not very much weight ought to be attached, what is the meaning of the phrase " articles of vertu books furniture and plate in my mansion houses at Orwell Park and Riby Grove " ? Do the three volumes in question, according to the ordinary meaning in the English language of " articles of vertu," fall within that description or within the term " books " ? On that, by the industry of counsel, I have been referred to probably all the material cases which have been decided in the last hundred years. First, I wish to express my opinion with regard to the phrase " articles of vertu," a phrase which I have always thought a somewhat unhappy one, because it is often used without a very exact knowledge of what it includes. I have the advantage of a decision of P. O. Lawrence J. (as he then was) in the case of *In re Baroness Zouche* (1), where there was a gift by Lady Zouche under her will of all the furniture, fixtures, plate, articles of vertu and

(1) [1919] 2 Ch. 178.

MAUGHAM J.
1931
TOMLINE'S WILL TRUSTS, *In re.*
PRETYMAN *v.* PRETYMAN.

curiosities at Parham House at the time of her decease. The question which arose for decision was in reference to some books of great value, including a copy of the Mazarin Bible, which was itself worth several thousands of pounds. It is to be noted that in the description of articles bequeathed books were not included. The learned judge scouted the opinion that books of this kind could be included as "furniture." He then had to decide whether such books could be included as "articles of vertu and curiosities." I observe that the Imperial Dictionary and the Oxford English Dictionary were cited. The Imperial Dictionary stated that the words "an article of vertu" meant an object of art, antiquity or curiosity, whereas in the Oxford English Dictionary the phrase was defined as including a curio, antique or other product of the fine arts. The learned judge preferred to accept the latter definition, and stated that in his opinion an article in order to be an article of vertu must have some artistic merit. (1) I may be allowed to add that there must be many objects of antiquity or curiosity which are not, ordinarily speaking, articles of vertu. I have suggested two, a prehistoric axe-head and an Egyptian mummy. I do not think that anybody in ordinary parlance would describe either of those things as an article of vertu. For my part I, like P. O. Lawrence J., think that an article of vertu must be in some sense a product of the fine arts; and the phrase connotes, if not artistic merit, a certain effort on the part of the person who originally produced it, in the direction of what he conceived to be the fine arts.

I come now to the question whether the three volumes are not included in the word "books." To my mind it is plain that a book is not necessarily a printed book. Until the invention of printing towards the close of the 15th century there were no printed books, and there still exist even at the present time in England a great number of books which are not printed books. But in addition, according to the ordinary meaning of the English word "book," there are many books which are not necessarily the sort of books which one finds

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(1) [1919] 2 Ch. 178, 185.

MAUGHAM J.

1931

TOMLINE'S WILL TRUSTS, *In re.*

PRETYMAN *v.* PRETYMAN.

in a library at all, and which yet are books. I might mention as an example the book which I have before me, a judge's notebook. I do not know how that could be described otherwise than as a book. I would add that it has been held in one of the cases cited to me: *In re Plowden* (1) that a volume containing manuscript music by Beethoven and Mozart, the sheets of music being bound together with an outer cover with considerable care by a bookbinder, passed under the description of the word "books." That is a decision of Swinfen Eady J. In a much older case of *Willis* v. *Curtois* (2) Lord Langdale decided that the manuscript notes of a physician relating to his attendances upon King George III. and the Queen, and a manuscript journal containing private memoranda and observations on the state of health and the malady of his late Majesty passed under the description of "all and every the books in and about my house in Tenterden Street."

Finally, I may mention the case of *In re Barratt* (3), where a manuscript book described as the log book of H. M. S. *Victory*, containing the original log entries and being a book in manuscript, not consisting of several sheets of paper afterwards bound up, but a book in which entries were made from time to time by the proper officer, was held to pass under a bequest of books. On the other hand, I must not forget that a collection of postage stamps bound up in an album has been held not to pass under the description of "books, pictures, prints and other household effects." That was the decision of the Court of Appeal in *In re Masson.* (4) I should add, perhaps, that the ratio decidendi of that case was that the album in which the stamps were contained was a mere accessory to the stamps, being no more than a receptacle in which the stamps were kept. Warrington L.J. attributed some weight to the fact that stamps, at any rate when they are of any value, are not usually and were not in that case pasted or permanently fastened into a book, but are attached in such a way that they are readily removable.

(1) 24 Times L. R. 883.

(2) 1 Beav. 189.

(3) 31 Times L. R. 502.

(4) 86 L. J. (Ch.) 753.

MAUGHAM J.
1931
TOMLINE'S WILL TRUSTS, *In re.*
PRETYMAN *v.* PRETYMAN.

In the present case I have come to the conclusion that these three volumes are books. The factors leading me to that conclusion are these: The volumes are in book form; to the outward eye they look like books, and in the ordinary course they can be, and are, handled like books. Next, I observe that they can be used like books, in the sense that, as one turns over the sheets, one can, if able to decipher the handwriting, read the various letters as a collection of letters bound up in the books. I observe further that they are not detachable letters in the ordinary sense, but have been so inserted in the sheets that they are in substance permanent parts of the volumes, unless, indeed, they should be cut out or removed by some forcible effort.

On these grounds I think that I am justified in holding that the volumes do pass, under the description of books, in the gift of various chattels to be held as heirlooms, and I do so with the greater satisfaction for the reason, as I have already said, that I have no doubt at all what the intention of the testator was in relation to this matter.

[His Lordship then stated that he was prepared to sanction the sale at a sum not to be lower, without the leave of the Court, than a figure written by counsel on a piece of paper handed up to the bench.]

Solicitors: *Farrer & Co.* for all parties.

K. R. A. H.

NOTLEY *v.* BISHOP OF BIRMINGHAM.

MAUGHAM
J.

1931
Feb. 10.

[1930. N. 344.]

Ecclesiastical Law—Presentation—Fitness of Clerk—Refusal of Bishop to Admit and License—Jurisdiction of Chancery Division—Action against Bishop—Order in Default of Appearance—Form of Order—Refusal of Bishop to obey Order—Notice of Motion to Archbishop of Canterbury—Form of Notice—Common Law Procedure Act, 1860 (23 *&* 24 *Vict. c.* 126), *ss.* 26, 27.

A bishop refused to admit and license X., a clerk in holy orders, to the perpetual curacy of Z. on the presentation of the patrons. The patrons then commenced an action in the Chancery Division, claiming that the bishop was bound to admit and license X. to the benefice. The bishop not having entered an appearance the action came before the Court on April 2, 1930, as a short cause, upon a motion for judgment in default of appearance, and an order was made that the bishop should admit and license X. to the benefice in due form according to law. The bishop refused or neglected to admit and license X. to the benefice, and to comply with the order. The patrons then moved the Court that a writ should issue to the Archbishop of Canterbury, commanding him to admit and license X. to the benefice at the nomination or presentation of the patrons:—

Held, that so much of the order of April 2, 1930, as ordered the bishop to admit and license X. to the benefice might be discharged, and that in lieu thereof and in substitution thereof it might be ordered that a writ should issue directed to the Archbishop of Canterbury commanding him to admit a fit person to the benefice at the nomination or presentation or other legal requisition of the plaintiffs as patrons thereof.

MOTION.

The patrons of the perpetual curacy and church of the district chapelry of St. Aidan, Small Heath, in the diocese of Birmingham, on November 7, 1929, presented the Rev. George Doyle Simmonds to the bishop of the diocese for admission and license to the benefice. The bishop having refused to admit and license the presentee, the patrons of the living commenced an action in the Chancery Division of the High Court claiming a declaration that the presentee had been duly nominated or presented to the benefice by the plaintiffs; a declaration that the bishop was bound to admit and license him to the benefice; an order that the bishop admit and license him to the benefice. The bishop did not enter an appearance. The plaintiffs filed a statement of claim, which stated (inter alia) that the presentee was a clerk in holy orders and a fit person to be admitted and licensed to the benefice, and that he was ready and willing duly to make and subscribe all such declarations and take all such oaths as were by law required to be made, subscribed, and taken before, or upon, admission and license to a vacant benefice; that the bishop, although well aware of each and every of the facts above mentioned, nevertheless on December 6, 1929, refused (*a*) to permit the presentee to make, subscribe and take such declarations and oaths, and (*b*) to admit and license the presentee to the benefice, and had ever since persisted in such refusals; that such refusals were unlawful, and that the defendant as such bishop was on December 6, 1929, and had ever since been, bound by law to permit the presentee to make, subscribe and take such declarations, and oaths, and to admit and license the presentee to the benefice by giving and granting to him the episcopal licence and authority of the defendant to perform the office of perpetual curate of the benefice and ecclesiastical duties incident to the office, and to receive and enjoy all and singular the stipends, profits and advantages of the benefice. The statement of claim further stated that the several acts and things which ought to be performed and done by the bishop as above mentioned might be lawfully performed and done by his Vicar-General, but only if the bishop should have authorized and required him so to do by executing and delivering to him a fiat or other document in that behalf, and if the bishop was unable personally to perform and do such acts and things, he ought to authorize and require his Vicar-General so to do by executing and delivering to him such a fiat or other document, which the bishop had not done and was not willing to do. The action came before Bennett J. on April 2, 1930 (1), as a short cause, upon a motion for judgment in default of appearance. Bennett J. made an order that the nominee of the patrons should be admitted and licensed by the bishop to the perpetual curacy in due form according to law. The order drawn up was in the

(1) [1930] W. N. 110.

following form: "This Court doth declare that the Reverend George Doyle Simmonds in the statement of claim referred to has been duly nominated or presented to the perpetual curacy and church of the district chapelry of St. Aidan, Small Heath, Birmingham, by the plaintiffs as patrons thereof. And this Court doth order that the defendant do admit and license the said Reverend George Doyle Simmonds to the said perpetual curacy and church in due form according to law. And it is ordered that the defendant do pay to the plaintiffs their costs of this action, such costs to be taxed by the taxing master. And the parties are to be at liberty to apply generally as they may be advised." The bishop refused or neglected to admit and license the Rev. G. D. Simmonds to the benefice, and to comply with the order.

The plaintiffs now moved the Court that a writ should issue directed to the Archbishop of Canterbury, Primate of All England and Metropolitan, commanding him to admit and license the Rev. G. D. Simmonds to the benefice at the nomination or presentation of the plaintiffs on the ground that the Court had declared that he had been duly nominated or presented to the benefice by the plaintiffs and had ordered the bishop to admit and license according to law, and that the bishop had refused or neglected and still refused or neglected to admit and license him and to comply with the order. The motion also asked that the bishop might be ordered to pay to the plaintiffs and to the Archbishop of Canterbury their respective costs of this application and of and incident to the issuing and execution of the writ. The bishop did not enter an appearance.

Vaisey K.C. and *Kenneth Macmorran* for the plaintiffs. The Archbishop of Canterbury has been joined as a respondent to this motion with his own consent, in order that the Court should have the benefit of any criticism or comment which his counsel might think proper to make on the submissions the plaintiffs are going to put before the Court. Those submissions would be that the Archbishop is the proper ministerial authority to institute or otherwise place in possession of a benefice in the diocese of Birmingham a clerk in holy orders, who has been presented to the benefice. According to precedent the Archbishop would act, not in person, but by his Vicar-General, and the writ issues to the Archbishop as Metropolitan, and in the circumstances it is one which would have issued on the application of the plaintiffs; the Archbishop himself would only be made a respondent when the writ actually issued.

The law requires that, before there can be an admission to the benefice, the presentee must make two declarations and take two oaths. He is bound to make a declaration of assent to the Thirty-nine Articles of Belief and a declaration against simony. He is also bound to take an oath of allegiance to His Majesty the King and an oath of canonical obedience to the bishop in all things lawful. Mr. Simmonds was and is ready to make those declarations and take those oaths, but notwithstanding his fitness and willingness to perform those preliminary statutory obligations, the defendant, on December 6, 1929, refused to allow him to make the declarations and take the oaths, and refused to admit him to the benefice. That refusal must be deemed to be wrongful. The rights of the patrons have been asserted in this Court and established by a definite finding, but that finding has so far proved wholly ineffective. It cannot be disputed that the defendant himself is in contempt. The plaintiffs are now before the Court, and they ask for the proper relief.

In an action, *Walsh* v. *Bishop of Lincoln* (1), commenced since the Common Law Procedure Act, 1860, which abolished the action of quare impedit, to which the Archbishop was not a party, the writ was directed to issue to him by his Vicar-General, and it was duly executed. In that action it was thought proper by Lord Coleridge C.J. to direct that a writ should issue to the Archbishop in the same form as was previously the custom in the old actions of quare impedit. That case was commented upon in Phillimore's

(1) (1875) L. R. 10 C. P. 518.

Ecclesiastical Laws, 2nd ed., vol. i., p. 349. The novelty in the present case is that the bishop is in contempt and will not come and tell the Court what his objections are, and it is therefore quite impossible to know whether he is disclaiming, except as ordinary, or what his position is.

With regard to the question of election, the plaintiffs' submission is that, although they have an order on the bishop, that order being fruitless, they have their election. They can have their writ either to the bishop or the Metropolitan, and, on the precedent of *Walsh* v. *Bishop of Lincoln* (1) they are entitled to ask for a writ to issue to the Archbishop. That case went back to the old form of mandatory writ called quare impedit, directing the appropriate provisional authority to institute a clerk into the benefice within the diocese of the objecting or reluctant bishop, and the present case is controlled by that. In a case begun in 1858, before the Common Law Procedure Act, 1860, *Bishop of Exeter* v. *Marshall* (2), where the bishop refused to admit a clerk, a writ was issued to the Archbishop. It is obvious that it was the precedent in that case that was followed in *Walsh* v. *Bishop of Lincoln.* (1) The declaration made by Bennett J. was a judgment in rem. Such a judgment is normally enforced by the executive officer, whoever he may be. Here the Metropolitan is the executive officer and the plaintiffs are entitled to a writ to him commanding him to admit a fit person, not necessarily Mr. Simmonds, to the benefice.

W. T. Monckton K.C. and *Errington* for the Archbishop of Canterbury. The form of the motion asking for a writ to issue to the Archbishop commanding him to admit a named person to the benefice is extremely undesirable. In all the precedents which have been found, the writ is directed to admit a fit person, not a particular person. That may well be because the Archbishop or other instituting authority is under careful obligation to examine before admitting. It is said that no bishop shall institute anybody to a benefice unless he is a fit person and he shall appear on due examination to be worthy of his ministry. Before the Archbishop

(1) L. R. 10 C. P. 518.

(2) (1868) L. R. 3 H. L. 17.

MAUGHAM J.

1931

NOTLEY v. BISHOP OF BIRMINGHAM.

could in any event have canonically instituted any person to the benefice, or admitted or licensed the particular clerk, he would have to examine him.

An order of the Court has gone to the bishop directing him to admit and license a fit and proper person. That is the same as a writ to the bishop before the Common Law Procedure Act, 1860. That order being directed to the bishop as ordinary, he is in contempt in not obeying it, and remains in contempt so long as he fails to obey. If a further order is made, a writ issued to the Archbishop to admit a fit and proper person, and the Archbishop, having examined a particular clerk, finds him unsuitable, inefficient in learning, or erroneous in doctrine, his duty will be to admit some other person presented by the patrons. That would be a highly undesirable thing while the bishop is still in contempt. *Grange* v. *Denny* (1) is an authority for the proposition that a patron had to elect whether he should move to have a writ issued to the bishop or the Archbishop of Canterbury. The patrons have made their election in the present case, and they cannot now proceed against the Archbishop. The point is dealt with in Watson's Clergyman's Law, 3rd ed., p. 219. On the authorities there is no doubt that according to the old practice there is this election, but there is nothing to suggest that the Court will follow a writ to the bishop by a writ to the Archbishop of Canterbury.

[MAUGHAM J. There is a difficulty in issuing a writ to the Archbishop, while there is in existence a mandatory order to the defendant commanding him to admit Mr. Simmonds.]

Vaisey K.C. Perhaps the better course would be for the personal order on the defendant to be removed in any way the Court should think fit, and a writ be issued to the Archbishop directing him to admit a fit and proper person to the benefice.

MAUGHAM J. In the old days the proper method of enforcing the rights of patrons who had duly nominated a fit person as the incumbent of a benefice was by an action which had

(1) (1616) 3 Bulstr. 174.

the name of quare impedit. Quare impedits, however, though they survived the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), were abolished by the Common Law Procedure Act, 1860, and by s. 26 of that Act, among other things, it is provided that no quare impedit shall be brought after the commencement of that Act in any Court whatsoever. There follows a provision that, "Where any such writ, action, or plaint would now lie, either in a superior or in any other Court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be endorsed a notice that the plaintiff intends to declare in dower . . . . or in quare impedit, as the case may be." Then s. 27 provides that: "The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons." I need not read the rest of the section. Accordingly the plaintiffs here were right in commencing their action by writ of summons on February 18, 1930, and that action took the place of the old action of quare impedit.

The question that arises in this case is, what is the right way of enforcing a judgment which declares that a particular person has been duly nominated or presented to the benefice, where the bishop of the diocese is refusing or neglecting to act upon the nominations in two ways—namely, refusing to permit the presentee to take the declarations and oaths and refusing to admit or license him?

In the days before the Common Law Procedure Act, 1860, it seems to be established beyond a doubt that the successful plaintiffs in a quare impedit suit were entitled to elect whether a writ should be directed to enforce the judgment to the Metropolitan or to the bishop. It is true that in Mallory's Quare Impedit (1757), p. 178, the learned author says that if a quare impedit be brought against the bishop and others and the bishop be found a disturber the writ ought to be granted to the Metropolitan upon a prayer to recover, but on p. 179 there is a statement of the effect of a case of *Grange* v. *Denny* (1), from which it seems that that passage is not completely accurate. If *Grange* v. *Denny* (1) is referred to it will be found that that was a case where quare impedit was brought in a case where the bishop was, as the old phrase goes, a disturber, and the members of the Court, which included Coke C.J., Dodderidge and Haughton JJ., were of opinion that the plaintiff had an election to have his writ either to the bishop or to the Archbishop. The action of quare impedit has been abolished, but the method of enforcing an order to be obtained on a writ of summons taking the place of an action of quare impedit remains, in my opinion, the same.

There are two cases of high authority which seem to me to establish that proposition. One is the case of the *Bishop of Exeter* v. *Marshall.* (2) To show the sequel to that case there has been produced before me a copy or extract from the Principal Registry of the Province of Canterbury dated August 12, 1868. After the House of Lords had affirmed the decision of the inferior tribunal, a writ was issued in the name of Her Majesty Queen Victoria to the Archbishop of Canterbury, in which the facts of the hearing in the various Courts are recited, and it directed the Archbishop of Canterbury that, notwithstanding the claim of the bishop he, the Archbishop of Canterbury, should admit a fit person to the church on the presentation of the persons named, who were entitled to present, and directing also that when he shall have executed the writ he should certify to Her Majesty before the justices of the Bench at Westminster immediately after the execution thereof.

The other case is the celebrated case of *Walsh* v. *Bishop of Lincoln.* (3) The action appears to have commenced in the year 1874, at any rate after the Common Law Procedure Act, and pleadings were delivered, the Bishop of Lincoln taking two pleas to which there was a demurrer. There was then

(1) 3 Bulstr. 174.

(2) L. R. 3 H. L. 17.

(3) L. R. 10 C. P. 518.

a joinder in demurrer, and the question therefore to be decided was whether the demurrer was one which could be sustained or not. The judgment of the Court, consisting of Lord Coleridge C.J., and Keating, Grove and Denman JJ., was delivered by Lord Coleridge. It was held that the pleas failed the defendant, and therefore there must, upon the demurrer to both pleas, be judgment for the plaintiff. That judgment, like the judgment in the case of the *Bishop of Exeter* v. *Marshall* (1), was enforced by a mandatory writ directed to be delivered to the Archbishop of Canterbury; and there again I have been given an extract from the Act of Institution, which was made on June 8, 1875. The Act recites as follows: " We have lately received a writ from Her Most Gracious Majesty of the tenor following: 'Victoria by the Grace of God,' " etc., " 'to the Most Reverend Father in God Archibald Campbell by Divine Providence Archbishop of Canterbury Primate of All England and Metropolitan Greeting. Whereas William Walsh, Priest in Holy Orders hath lately in Our Court . . . . recovered against the . . . . Lord Bishop of Lincoln,' " the judgment in question. Then it proceeds as follows: " 'Whereupon it was considered by our Court of the Bench that the said William Walsh should have our writ to you the said Archbishop the Metropolitan of that place to be directed (inasmuch as the said Bishop of Lincoln the Ordinary thereof is a party in the suit). And that notwithstanding the disclaimer of the said Bishop you should admit a fit person to the Rectory and Parish Church aforesaid at the presentation or other legal requisition of the said William Walsh' "—that is the patron—" 'We therefore command you that notwithstanding the disclaimer of the said Bishop you admit a fit person to the Rectory and Parish Church aforesaid at the presentation or other legal requisition of the said William Walsh; and how you shall have executed this Our writ certify to us on,' " etc. I see that Lord Coleridge is described as the witness to that writ, and thereupon the Archbishop, it appears, admitted Mr. Walsh to the Rectory and Parish Church in question.

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(1) L. R. 3 H. L. 17.

In my opinion if an action in the nature of a quare impedit action is brought in His Majesty's Courts against the bishop of the diocese, who is technically "a disturber," and the action succeeds, the plaintiffs have a right to elect whether a writ shall be issued substantially in the old form to the bishop or to the Metropolitan. I venture to think that in most cases the better course is to follow the precedent of the two cases I have mentioned, and to direct the writ in question to be issued to the Metropolitan. Counsel for the Archbishop in the present case has pertinently remarked to me that there is a difficulty in such writ going to the Archbishop when there is a subsisting direction under an order of the Court to the bishop requiring him to admit and license a named person to the perpetual curacy and church in due form according to law. It will be noted at once that an order directed to the bishop in such a case is in a very different form from the writ directed to the Metropolitan. The bishop must be taken in this Court at any rate to have admitted by his default in defence the fitness of Mr. Simmonds, which is alleged in the statement of claim. The Archbishop is by no means in that position. It is clear that the writ, if issued to the Archbishop, would direct him to admit a fit and proper person to the benefice in question upon the presentation of the persons who are the patrons. It is apparent that while there is an order directing the bishop to admit and license Mr. Simmonds to the benefice there is great difficulty in permitting the writ to issue in the form I have mentioned to the Metropolitan. That difficulty, however, I think can be got over in this way. The plaintiffs will amend the notice of motion and ask that that part of the order of April 2, 1930, which orders the defendant to admit and license Mr. Simmonds, may be discharged, and that in lieu of that direction a writ may issue directed to the Archbishop of Canterbury in the form I have mentioned. Subject to the amendment being made and filed and the passing of the requisite two clear days, I see no objection to that part of the motion being acceded to. It seems to me that in a case where the defendant not only does not appear, but clearly has evinced a determination not to comply with the order of the Court, it is far better that that part of the order should be discharged which orders him to do something which the Court cannot compel him to do and could only attempt to enforce by process in the nature of contempt, which in the particular circumstances may be a very unsatisfactory remedy. Accordingly I accede to the motion to discharge that part of the order. I am then left in this position, that although the Court has declared Mr. Simmonds to be duly nominated and presented to the perpetual curacy, the defendant the Bishop of Birmingham does not intend to admit and license Mr. Simmonds. In these circumstances I think the writ may properly be issued directed to the Archbishop of Canterbury in the form to which I have previously referred. The defendant must pay the plaintiffs' costs of this motion; and (subject to his intervening on such amended motion) the order would go as above indicated.

The amended notice of motion was duly filed and served on the bishop, who again failed to enter an appearance. It was in the following form: That so much of the order of April 2, 1930, as ordered the bishop to admit and license the Reverend G. D. Simmonds to the perpetual curacy and church of the district chapelry of St. Aidan might be discharged, and that in lieu thereof and substitution thereof it might be ordered that a writ should issue directed to the Archbishop of Canterbury commanding him to admit a fit person to the perpetual curacy and church of the district chapelry of St. Aidan at the nomination or presentation or other legal requisition of the plaintiffs as patrons thereof, and how he had executed the writ,to certify to His Majesty in His Majesty's High Court of Justice immediately after the execution thereof. And that the respective costs of the plaintiffs and of the Archbishop of Canterbury of this application and of and incident to the issuing and execution of the writ might be taxed, and that the bishop might be ordered to pay to the plaintiffs their costs when taxed. And that the plaintiffs

MAUGHAM J. 1931 NOTLEY v. BISHOP OF BIRMINGHAM.

(submitting thereto) might be ordered to pay to the Archbishop his costs when taxed.

Solicitors for plaintiffs: *Vizard, Oldham, Crowder & Cash.*
Solicitors for Archbishop of Canterbury: *Lee, Bolton & Lee.*

P. J. B.

FARWELL J. 1931 *Feb.* 3.

HAMMOND *v.* LONDON COUNTY COUNCIL.

[1929 H. 2369.]

Poor Law—Officer or Servant—Superannuation—Officer or Servant away on War Service—Employment of Deputy—"Regular" Employment—Poor Law Officers' Superannuation Act, 1896 (59 *&* 60 *Vict.* c. 50), *ss.* 2, 3, 4, 10, 19.

The plaintiff was in the service of the defendants' predecessors in their capacity of Poor Law Guardians for fifteen years before his retirement, but during five of those years he was only employed as gate porter to a Poor Law Institution in substitution for its regular gate porter who was away on war service:—

Held, that in computing the amount of his superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, the plaintiff, though only a temporary substitute for the regular gate porter, was entitled to reckon his actual five years' deputy service as regular employment in the capacity of a Poor Law officer or servant.

WITNESS ACTION.

The plaintiff had been employed by the defendants' predecessors, the City of London Union and the Westminster Union, as an officer or servant in their capacity of Boards of Guardians.

From November 9, 1913, to December 15, 1913, he was employed by the City of London Union as temporary porter.

From December 16, 1913, to August 5, 1914, he was employed by the Westminster Union as night watchman to the Edmonton Institution.

From August 6, 1914, to January 9, 1920, the Edmonton Institution having been closed on July 31, he was employed by the Westminster Union as gate porter to the Fulham Institution in substitution for the regular gate porter Pritchett, who was away on war service.

FARWELL
J.
1931
HAMMOND
v.
LONDON
COUNTY
COUNCIL.

From January 10, 1920, to April 12, 1929, Pritchett having obtained another post, the plaintiff was employed by the Westminster Union as regular gate porter to the Fulham Institution.

On March 9, 1929, the plaintiff attained the age of seventy, and on April 12, being incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of body, he resigned his office or employment under the Westminster Union.

The plaintiff's average salary during the last five years of his employment was 177*l.*, and on May 7 he applied to the Westminster Union under the Poor Law Officers' Superannuation Act, 1896, for a superannuation allowance of 44*l.* 5*s.*, being calculated at $\frac{15}{60}$ of 177*l.* for his fifteen completed years of service.

The Westminster Union were however advised by the Minister of Health that the five years' service as a substitute for Pritchett could not be counted, as it did not constitute the plaintiff an officer or servant during that period. He was consequently only awarded $\frac{10}{60}$, i.e., 29*l.* 10*s.*

On July 16 the plaintiff commenced this action against the Westminster Union for a declaration that the above five years ought to be counted.

On April 1, 1930, the functions, property and liabilities of the Westminster Union as a Poor Law Authority were transferred to the London County Council under the Local Government Act, 1929 (19 Geo. 5, c. 17), ss. 1, 113, Sch. IX., Part I., para. 7, and by an order of May 2, 1930, they were substituted as defendants.

The defendants and their predecessors were perfectly willing to include the five years' period if they might properly do so; but having regard to the Minister's opinion they could not run the risk of being surcharged.

E. Gilbert Woodward for the plaintiff. The Poor Law Officers' Superannuation Act, 1896, provides as follows:—

Sect. 2 provides that "every officer and servant" in the service or employment of the Guardians of a union who shall

FARWELL J.
1931
HAMMOND v. LONDON COUNTY COUNCIL.

become incapable of discharging the duties of his office with efficiency by reason of permanent infirmity of mind or body shall be entitled on resigning his office or employment to receive during life out of the common fund of the union a superannuation allowance according to the scale laid down in the Act.

Sect. 3 fixes the scale at $\frac{1}{60}$ of his average salary or wages and emoluments for each completed year of service, the average being based on his salary, wages or emoluments for the last five years of employment.

Sect. 4 provides that " all service " by an officer or servant under any authority to whom the Act applies shall be aggregated and reckoned for the purposes of the Act, whether the service has been continuous or not, and whether his whole time has been devoted to the service or not.

Sect. 10 provides that every superannuation allowance granted under the Act shall be payable to or in trust for the officer or servant and shall not be assignable or chargeable with his debts or liabilities.

Sects. 12 and 13 provide for an annual contribution of 2 per cent. of the salary or wages and emoluments of an officer or servant to the common fund, the amount to be deducted from his salary or wages.

Sect. 19 provides that " officer " includes " every officer " in the service of an authority to whom the Act applies whether his whole time is devoted to the duties of his office or not; and " servant " includes every servant " regularly employed " at wages by every such authority as aforesaid.

The question might no doubt have been referred to and decided by the Local Government Board (now the Minister of Health) under s. 18, but it was thought better to come to the Court. The Local Government Board's powers and duties were transferred to the Minister of Health by the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), s. 3, sub-s. 1 (*a*).

Now the pension is clearly given to the officer, not to the office. Under s. 4 " all service " has to be aggregated and the plaintiff can obviously aggregate his five years' service as deputy for Pritchett. If not, no one could aggregate those five years. Pritchett was not doing Poor Law service and could not aggregate them under the 1896 Act. This is recognized by the Local Government (Emergency Provisions) Act, 1916 (6 & 7 Geo. 5, c. 12), s. 3, which enables persons like Pritchett to reckon their war service years as part of their Poor Law service. Apart from that Act he could not have done so. Now he can. But that does not take away the plaintiff's right.

The present point is virtually covered by *Rex* v. *Lyon* (1), where special duty grants to asylum staffs depleted by the war were held aggregable, subject to contributions, under the similar sections of the Asylums Officers' Superannuation Act, 1909 (9 Edw. 7, c. 48). That case was approved in *Salford Guardians* v. *Dewhurst* (2), a case under the 1896 Act, where war bonuses were held aggregable subject to contributions.

The plaintiff's service as deputy was "regular employment," though liable to be terminated by Pritchett's return: *Smith* v. *Buxton*. (3) No contributions were in fact paid or deducted during the five years' deputy service, but it has been arranged that for the purposes of argument no point shall be made on this omission.

Danckwerts for the defendants. I labour under the great disadvantage of not knowing the reasons on which the Minister's opinion was based, but it is my duty to support his opinion as far as I can gather them. There appear to be two points.

In the first place the plaintiff's employment as Pritchett's deputy, being liable to terminate the moment Pritchett returned, was not "regular employment" within s. 19. It was purely precarious and quite different from the regular seasonal employment in *Smith* v. *Buxton*. (3)

Secondly. The allowance is attached to the office, not to the person. In this case the office of gate porter was filled by Pritchett, and he was the only person, if any one, entitled to count the five years. Pritchett was in fact given this right by the Local Government (Emergency Provisions)

(1) [1921] 1 K. B. 203, 209.
(2) [1926] A. C. 619, 624, 627.
(3) (1915) 8 B. W. C. C. 196; 1911-1920 Digest, 4408.

Act, 1916, s. 3. Surely the plaintiff cannot count the same five years.

In *Rex* v. *Lyon* (1) and *Salford Guardians* v. *Dewhurst* (2) the claimants were actual officers remunerated for additional work, or actual officers receiving war bonuses, and the extra remuneration or war bonuses were naturally held aggregable as emoluments of their office. Those cases would apply if the plaintiff had been, for instance, an official night watchman performing the duties of gate porter for extra remuneration. But here he was not an officer at all during his five years' mere deputy work, so that his salary as deputy during that period is not aggregable.

FARWELL J. [after stating the facts and reading ss. 2 and 4 of the 1896 Act and pointing out that s. 10, though not of much assistance, indicated that the superannuation allowance was a personal allowance paid to the officer or servant, and suggested that it was paid in respect of his service and not in respect of the office he held, read the definition of "officer" and "servant" in s. 19, and continued :]

There is nothing in the definition of "officer" to show that the plaintiff is not entitled to include this vital period of five years in calculating the amount of his allowance. If an officer, as distinct from a servant, he is entitled to include it, because during those five years he was in the employment of the defendants' predecessors and giving them service. "All service" has to be reckoned under s. 4, with the result that during the five years the plaintiff would be entitled to reckon the five years as part of his service, and be liable to pay contributions under ss. 12 and 13 during that period.

It is suggested however that the plaintiff was a servant not "regularly employed" because his employment as deputy, being liable to cease at any moment on the return to duty of the regular gate porter, was precarious and irregular. But in my judgment the expression "regularly employed" does not exclude service liable to be put an end to in that way. It is merely contrasted with "casual employment."

(1) [1921] 1 K. B. 203, 209.

(2) [1926] A. C. 619, 624, 627.

FARWELL J.

1931

HAMMOND v. LONDON COUNTY COUNCIL.

It is of course a question of fact in each case whether a man was regularly employed or not, but in this particular case I think that the plaintiff, who was employed for the five years and paid his wages day in and day out during that period as a servant or officer of the defendants' predecessors, was "regularly employed" during that period although his service might have been suddenly determined by the return of the regular gate porter.

The only other suggestion is that the right to an allowance is attached to the office which the particular person holds, and not to the officer or servant. That is entirely contrary to the Act read as a whole. Under s. 4 it is clear that it is the officer or servant who gives the service, whose service is to be computed. He is entitled to his allowance, not in virtue of his particular post, but because he gives the service. Here the plaintiff, who in my opinion was an officer, gave regular service to the defendants' predecessors for the whole fifteen years, including his five years' deputy service, and he is entitled to have his superannuation allowance calculated on that basis. I make a declaration with costs accordingly.

Solicitors: *Stutfield & Son; Solicitor to the London County Council.*

G. R. A.

FARWELL
J.

1931

Feb. 25.

In re PITTS.

COX *v.* KILSBY.

[1930. P. 2634.]

Intestacy—Murder of Intestate—Intestate's Estate—Murderer's Right to Distributive Share—Statutory Right—Public Policy Rule—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *s.* 46.

Semble: The rule of public policy which prevents a sane murderer from taking any benefit under his victim's will prevents him also from taking a distributive share under his victim's intestacy.

In the present case the murderer was insane, but if the point arose for decision, the views of Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, 157, 158 would probably prevail over those of Joyce J. in *In re Houghton* [1915] 2 Ch. 173, 178 and the peremptory provisions of the Administration of Estates Act, 1925, s. 46, would be read and construed subject to the public policy rule.

WITNESS ACTION.

On or about August 19, 1929, a husband murdered his wife and their infant son, and immediately afterwards committed suicide.

The wife died intestate possessed at her death of 55*l.* on bank deposit and 1755*l.* on deposit with a building society. She also held another 251*l.* on deposit with the building society in trust for her infant son and there was also 55*l.* on a Money Safe Deposit Account in the son's name.

On September 13, 1929, George Pitts took out administration to the estate of the husband, who died intestate. He died on April 23, 1930.

On July 16, 1930, the defendant took out administration de bonis non to the husband's estate and on September 5, 1930, she took out administration to the wife's estate.

On October 14, 1930, the plaintiff, the wife's mother, commenced this action against the defendant for a declaration that the plaintiff was entitled to the whole of the wife's estate and the infant's estate, contending that the husband's interest under the Administration of Estates Act, 1925, s. 46, sub-s. 1, paras. (i.), (iv.), was on the ground of public policy barred by his murders.

FARWELL
J.
1931
PITTS,
In re.
COX
v.
KILSBY.

In the alternative she claimed a declaration that she was entitled to the wife's estate subject to payment of 1000*l.* to the husband's estate under s. 46, sub-s. 1, para. (i.).

The action was intituled in the matter of the wife's estate.

The defendant raised three points :—

First, that the moneys in question were deposits or investments of the husband's own money surreptitiously made without his knowledge and therefore remained his own property. This point failed on the evidence.

Secondly, that at the time of the murders the husband was insane. This point was established by the evidence.

Thirdly, that even if the husband was not insane, there was no rule of public policy to defeat the operation of the Administration of Estates Act, 1925, s. 46, that rule being confined to cases of wills, and merely preventing a murderer from claiming under the will of a murdered testator.

The questions of law and fact were argued together and in the result the third point did not really arise, and was not decided. As however it was argued, and the Court made some observations upon it, it is thought useful to report it.

Sir Gerald Hurst K.C. and *H. S. G. Buckmaster* for the plaintiff. There is a well known rule that a sane murderer cannot claim any benefit under his victim's will. That rule is based on public policy. The question whether the same rule applies on the victim's intestacy has never been decided.

[FARWELL J. If the rule is based on public policy, it is difficult to see why it should not apply to intestacy.]

It is extremely difficult ; but it will no doubt be contended that the express provisions of a statute like the Administration of Estates Act, 1925, s. 46, cannot be overridden by public policy.

The rule was much discussed in *Cleaver* v. *Mutual Reserve Fund Life Association.* (1) In that case a husband effected an insurance on his own life in favour of his wife. This created a trust in her favour under the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11, with a resulting

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(1) [1892] 1 Q. B. 147.

FARWELL J.

1931

PITTS, *In re.* COX *v.* KILSBY.

trust to the husband. The wife murdered her husband, and was duly sentenced, but the sentence was commuted. It was held that neither her assignee, nor the administrator of her property appointed under the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 9, could recover on the policy, but that the husband's executors were alone entitled.

Lord Esher said (1): "That the person who commits murder, or any person claiming under him or her, should be allowed to benefit by his or her criminal act, would no doubt be contrary to public policy" and (2) "Applying the rule of public policy to this construction of [s. 11], the wife here has by her crime rendered the trust in her favour incapable of performance. It must, therefore, be treated as if it did not exist;"

Fry L.J. said (3): "The principle of public policy invoked is in my opinion rightly asserted. . . . . No system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person." He also said (4) that the principle would equally apply to the case of a cestui que trust asserting a right as such by reason of the murder of the prior life tenant or of the assured in a policy; "and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be read and construed as subject to it."

Later on, dealing with s. 11, he said (5): "Now the trust thus created by statute, and the language of the statute creating it, must . . . . be both subject to the principle of public policy . . . . —namely, the trust is one which cannot be enforced by a murderess of her husband, and the language of the statute must be read as if it contained an exception of such a case."

In that case therefore the trust for the wife, though created by statute, was abrogated by public policy.

In *In the Estate of Crippen* (6) the wife died intestate. The husband survived her, but as he was her murderer his executrix and universal legatee was not allowed to take out administration. Sir Samuel Evans P. said: "It is clear . . . . that no person can obtain, or enforce, any rights resulting to him from his own crime; neither can his representative, claiming under him, obtain or enforce any such rights. The human mind revolts at the very idea that any other doctrine could be possible in our system of jurisprudence."

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(1) [1892] 1 Q. B. 152.

(2) Ibid. 154.

3) Ibid. 156.

(4) [1892] 1 Q. B. 157.

(5) Ibid. 158.

(6) [1911] P. 108, 112.

In *In the Estate of Hall* (1) the same doctrine was applied to the manslaughter of a testator, and on the whole we submit that the rule is of universal application and that no benefit statutory or otherwise directly arising from a murder can accrue to the murderer.

Alexander Grant K.C. and *Heckscher* for the defendant. If the husband was insane at the time of the murders, the case is covered by the considered judgment of Joyce J. in *In re Houghton* (2), where an insane murderer took a share of his intestate victim's estate. If he was sane the question arises whether the public policy rule applies to distribution on intestacy. Joyce J. strongly approved of the judgment in *Carpenter's Estate* (3) to the effect that the rule does not apply, as no public policy can contravene the positive language of a statute, but it was not necessary for him to decide it.

The plaintiff practically seeks to preface s. 46 by the words "Subject to any rule of public policy" but the draftsman, with all the authorities before him, thought it better to omit those words.

Cleaver's case (4) is not quite the same. The policy was a gift from the husband, and apart from the Married Women's Property Act, 1882, it would have been revocable. Sect. 11 by attaching a trust rendered it irrevocable, but it still remained a gift from the husband. It was held that the wife having murdered her husband could not enforce the trust attached to his gift.

But here there is no case of gift, trust or bequest. There

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(1) [1914] P. 1.

(2) [1915] 2 Ch. 173, 177.

(3) (1895) 50 Am. St. Rep. 765, 766, 767.

(4) [1892] 1 Q. B. 147, 157, 158.

FARWELL J.
1931
Pitts, *In re.*
Cox *v.* Kilsby.

is pure intestacy, and the peremptory language of s. 46 cannot be cut down by any rule of public policy.

Farwell J. [after stating the facts and holding that at the time of the murders the husband was in fact insane, continued :] As a general proposition it is well settled that no sane murderer can benefit under his victim's will. If therefore the husband had not been insane his personal representative would have claimed through a sane murderer, and if the wife had made a will in her husband's favour, it is plain that the husband's personal representative could not have taken under it.

That rule is based on public policy. But there is a question whether it prevents a sane murderer from taking a distributive share under his victim's intestacy.

In *In re Houghton* (1) Joyce J. thought that the rule did not apply to an intestacy, as the intestate succession was settled by statute. His observations on the point were only obiter, as the murderer was insane, but that may be the law, though it is difficult to see why. If public policy prevents a murderer from taking under his victim's will, why should it not prevent him from taking under his victim's intestacy ? If it had been necessary to decide the point I should have thought that the views of Fry L.J. in *Cleaver's* case (2) would prevail and the provisions of the Administration of Estates Act, 1925, s. 46, however peremptory, would be read and construed subject to the public policy rule. But it is unnecessary and I do not decide it.

The public policy rule postulates a mens rea, and a verdict of "guilty but insane," would have been equivalent to an acquittal as regards murder : *Felstead* v. *The King* (3) ; therefore the rule does not apply, and the husband's estate cannot be deprived of his distributive share. His personal representative will therefore take 1000*l.* out of the wife's estate, and will also take the whole estate of the infant, who under the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 184, is presumed to have survived the wife.

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(1) [1915] 2 Ch. 173.
(2) [1892] 1 Q. B. 147, 157, 158.
(3) [1914] A. C. 534.

FARWELL J.
1931
PITTS, *In re.*
COX *v.* KILSBY.

Solicitors: *Ranger, Burton & Frost, for J. D. Douglas, Beattie & Douglas, Northampton; James, Mellor & Coleman, for Phipps & Troup, Northampton.*

G. R. A.

GRANGER *v.* SOUTH WALES ELECTRICAL POWER DISTRIBUTION COMPANY.

[1930. G. 2277.]

BENNETT J.
1930
Nov. 11.

Supply of electricity—Account—Arrears—Receiver—Liability—South Wales Electrical Power Distribution Company Act, 1900 (63 & 64 *Vict. c. cclxxxii.*), *s.* 40.

A colliery company, at the time of the appointment of a receiver in a debenture holders' action, owed a sum of money to an electrical distribution company for electricity supplied to them. The distribution company threatened to cut off the supply of electricity from the colliery company, unless payment of the arrears was guaranteed by the receiver. The receiver commenced an action to restrain the distribution company from cutting off the supply.

By s. 40 of the South Wales Electrical Power Distribution Company Act, 1900, it is provided that: "the Company shall give a supply of energy to any person who requires a supply which may be given by this Act other than a supply in bulk upon that person entering into a binding agreement to take the energy upon such terms as failing agreement shall be fixed by a single arbitrator appointed by the Board of Trade."

Held, that the receiver was a "person" within the section and was therefore entitled to require a supply of electricity upon the terms set out in the section; and that the distribution company must be restrained from withholding or threatening to withhold from him a supply of electricity.

Paterson v. *Gas Light and Coke Co.* [1896] 2 Ch. 476 distinguished.

MOTION.

The following statement of the facts is taken substantially from his Lordship's judgment:—

The Albion Colliery is owned by a limited company incorporated under the Companies Acts called "the Albion Steam Coal Company, Ld." The colliery is an extensive one situated in the Rhondda Valley, and the company employed

BENNETT J.

1930

GRANGER v. SOUTH WALES ELECTRICAL POWER DISTRIBUTION CO.

a large number of men and had in normal times an output of a large quantity of coal in every year. It got into difficulties and, debentures having been issued, the holders of the debentures commenced proceedings to enforce their security on September 6, and in the ordinary way obtained the appointment of the plaintiff as receiver and manager. The order appointing the plaintiff receiver and manager limited his powers of management to keeping the colliery ventilated and pumped and free from damage. The ventilation of the colliery is effected by fans worked by electric power which the company, the Albion Steam Coal Company, Ld., obtained from the defendants, and the colliery is pumped by power obtained from the same company. At the date when the company got into difficulties and the receiver was appointed there was due from the company to the defendants a sum of 2266*l.* 9*s.* for electrical energy supplied for pumping and ventilating the colliery and not paid for. When the plaintiff was appointed receiver the defendants, on September 11, by their secretary, intimated to the plaintiff that the above mentioned sum was due and that they would be prepared to continue the supply of electricity to the colliery if the plaintiff, as receiver, would guarantee payment of the balance due to the defendants up to August 31, 1930, the proportion of the September account up to the date of the appointment of the receiver, and all amounts to become due to the defendants for current supplied during the plaintiff's appointment, credit being given for any coal supplied to the defendants by the plaintiff from the colliery of which he was receiver. That intimation gave rise to some correspondence, the effect of which is summarized in the plaintiff's affidavit in support of this motion in this way: "By letter dated the 11th of September 1930 the defendants informed me that the sum of 4455*l.* 3*s.* was due to them for electricity supplied to the company up to the 31st of August last in addition to which a further sum would become due for electricity supplied since that date and that against that sum there was due by the defendants to the company 2188*l.* 14*s.* for coal supplied up to the 31st of August last leaving a balance due to the defendants of 2266*l.* 9*s.* up to the said 31st of August 1930 and that subject to confirmation by their Board of Directors the defendants would be prepared to continue the supply of electricity to the said colliery if I as receiver would guarantee payment of (*a*) the balance due to the defendants up to the 31st of August last; (*b*) the proportion of the September account up to the day of my appointment; and (*c*) all amounts to become due to the defendants for current supplied for the duration of my appointment credit being given for any coal supplied to the defendants. By letter of the 16th September 1930 the defendants informed me that their Board confirmed their letter of the 11th of September and that unless I forwarded the guarantees asked for within twenty-four hours the current would be cut off. I subsequently arranged with the defendants to pay their proper charges for current supplied as and from the 10th of September last until further notice and they agreed to suspend the cut off notice for fourteen days from the 17th of September asking me to make arrangements in the meantime for the payment of the moneys owing to them by the company." The correspondence is referred to, the effect of which is as stated. Before the appointment of the receiver the defendants were supplying electric power to the Albion Steam Coal Company, Ld., in accordance with the terms of a contract dated June 21, 1929, which fixed the charges to be made and provided that the agreement should remain in force for two years from May 1, 1929, and thereafter until determined by either party giving three months notice in writing to the other, and it was subject to conditions, one of which conditions provides: that the company—that is the defendants—shall be at liberty on giving twenty-four hours notice in writing to the consumer to cancel the agreement and to discontinue the supply of electrical energy if the consumer fails to pay any monthly account within twenty-eight days after the same has been rendered.

On September 26, 1930, the receiver gave formal notice in writing to the defendants that pursuant to the provisions of the Electric Lighting Acts and to s. 40 of the South

Wales Electrical Power Distribution Company Act, 1900 (1), he required a supply to be given to him at the colliery and that he was ready and willing to enter into a binding agreement to take the energy upon such terms as might be agreed with the defendants or as, failing agreement, should be fixed by the arbitrator appointed by the Board of Trade.

The defendants having refused to acknowledge the right of the receiver to receive a supply of electrical energy at the colliery, the receiver commenced this action, in which he sought an injunction to restrain the defendants from withholding from him a supply of electricity in accordance with his written request of September 26, 1930.

Trevor Hunter K.C. and *Harold Christie* for the plaintiff. Sect. 40 of the private Act of 1900 distinguishes this case from the other decided cases. In *Paterson* v. *Gas Light and Coke Co.* (2) the whole point was whether the receiver was claiming as " owner or occupier " under s. 11 of the Gasworks Clauses Act, 1871. The words " owner or occupier " cannot be read into s. 40 of the private Act.

[They also referred to Electric Lighting Act, 1882, s. 21; Gasworks Clauses Act, 1871, s. 39.]

Gavin Simonds K.C. and *J. Abady* for the defendants. The receiver and manager is a caretaker in relation to the premises. *Paterson's* case (2) is decisive as to the effect of the appointment of a receiver and manager—he is neither an owner nor an occupier, but a caretaker. These Acts contemplate that there will be one person and no more who may in these contracts be contemplated as the owner or occupier: see *Husey* v. *London Electric Supply Corporation*. (3) The plaintiff has not brought himself within the section as a person entitled to a supply. Accordingly the motion must fail and the defendants are entitled to act on s. 21 of the Electric Lighting Act, 1882, and to cut off the supply.

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(1) South Wales Electrical Power Distribution Company Act, 1900 (63 & 64 Vict. c. cclxxxii.), s. 40: "The Company shall give a supply of energy to any person who requires a supply which may be given by this Act other than a supply in bulk upon that person entering into a binding agreement to take the energy upon such terms as failing agreement shall be fixed by a single arbitrator appointed by the Board of Trade." The section then contains provisions with regard to the fixing of terms by the arbitrator.

(2) [1896] 2 Ch. 476.

(3) [1902] 1 Ch. 411.

Trevor Hunter K.C. in reply. The receiver is on the premises under an order of the Court. He is in control at the moment and has duties to perform. The defendants are in effect threatening to cut off the supply unless he pays an old debt under a former agreement.

BENNETT J. This is a motion by Mr. Granger against the South Wales Electrical Power Distribution Company for an injunction to restrain the defendants from withholding from the plaintiff a supply of electricity to the Albion Colliery at Pontypridd in the county of Glamorgan in accordance with a written request by the plaintiff to the defendants of September 26, 1930. The plaintiff is the receiver and manager with limited powers appointed in a debenture holders' action on September 12 of this year. [His Lordship stated the facts and continued :] I think it is upon the footing that the contract dated June 21, 1928, is the contract which regulates the right of the plaintiff to receive electrical power from the defendants that the defendants claim that the plaintiff should give them the guarantees which they asked for in their letter of September 11. I am not sure of that and I do not think it matters.

The position of the plaintiff is a very simple one. He says, and rightly says, that the powers and obligations of the defendants, so far as material to the present case, are to be found in a private Act, the South Wales Electrical Power Distribution Company Act of 1900. [His Lordship read the material portion of s. 40.] The plaintiff says that he is a person who requires a supply and who is willing to enter into a binding agreement upon such terms as, failing agreement, shall be fixed by a single arbitrator appointed by the Board of Trade. That is the basis of his case.

The defendants contend that the answer to that case is to be found in the provisions of the Electric Lighting Acts incorporated into the private Act and in the decision of the Court of Appeal in *Paterson* v. *Gas Light and Coke Co.* (1), a decision with respect to the right of the receiver and manager appointed by the Court to require the supply of gas to premises charged by the trust deed under which the right to have a receiver appointed arose. It is said that that is an authority which governs this case, because the sections which were considered by the Court of Appeal are incorporated into the South Wales Electrical Power Distribution Company Act of 1900. In *Paterson* v. *Gas Light and Coke Co.* (1) a limited company, Marriage, Neave & Co., Ld., was supplied by the Gas Light and Coke Company with gas, and at the time when the receivers were appointed the company owed the gas company 90*l.* for gas supplied. The gas company threatened to cut off the gas unless the arrears were paid and thereupon the receivers—there were two—commenced the action to restrain the gas company from cutting off the gas in accordance with their threat. The receivers claimed that they were entitled to a supply of gas by virtue of s. 11 of the Gasworks Clauses Act, 1871, whereby the gas company was bound, on being required to do so by the owner or occupier of any premises within a certain distance of any main of the company, to give and continue to give a supply of gas to such premises. Kekewich J. held that the receivers and managers were in the position of new tenants or new occupiers and so entitled by virtue of the provisions of that section to a supply of gas. He was reversed by the Court of Appeal, who decided that the receivers and managers were not owners or occupiers within the meaning of s. 11, and that by virtue of s. 18 of the Gas Light and Coke Company Act of 1872 the defendants were entitled to cut the gas off unless the arrears were paid. The basis of the decision I think was that the receivers and managers were not owners or occupiers within the meaning of s. 11 of the Gasworks Clauses Act, 1871. The contention of the defendants is that any person who requires a supply of electrical energy must be an owner or occupier of premises, and that therefore you have to read into s. 40 of the private

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(1) [1896] 2 Ch. 476.

Act, that is the Act of 1900 of the defendants, an obligation on the part of the defendants to supply energy to any person being the owner or occupier of premises, and that if you read those words into the section, then, unless there has been a new owner or occupier as a result of the order appointing the plaintiff receiver and manager in a debenture holders' action, s. 21 of the Electric Lighting Act, 1882, would entitle the defendants to cut off the supply of electricity, because the occupiers, being the Albion Steam Coal Company, Ld., had failed to pay what was owing from them at the time when the receiver was appointed. I see no reason why I should read anything into the private Act which is not there. The occupation of the receiver is not, I think, for all purposes the occupation of the company. The receiver certainly is not the agent of the company; by "the company" I mean the Albion Steam Coal Company, Ld. No agent of the company has a right of access to the terminals upon the property of that company without the consent of the receiver, and as receiver he at any rate has control of terminals to which electrical energy can be supplied, and being a person who is in control of something to which electrical energy can be supplied, I see no reason why I should not give effect to the language of s. 40 and hold him to be a person who requires a supply within the meaning of that section. I can see no sound reason why I should read into the section the words: "being the owner or occupier of the premises." Therefore, as it seems to me, this case is not covered by the decision of the Court of Appeal in *Paterson* v. *Gas Light and Coke Co.* (1), where the Court of Appeal had to construe sections which in my judgment differ from the sections which it is my duty to construe.

In my judgment, therefore, the plaintiff, being a person within the section, is entitled to call for a supply, and the defendants, in my judgment, are acting wrongfully in threatening to withhold from him a supply, except upon terms which they have stated in their letter of September 11. I will grant an injunction in the terms of the notice of motion.

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(1) [1896] 2 Ch. 476.

BENNETT J.
1930
GRANGER v. SOUTH WALES ELECTRICAL POWER DISTRIBUTION CO.

[NOTE.—This motion was ultimately treated as the trial of the action.]

Solicitors: *Ingledew, Sons & Brown, for Ingledew & Sons, Cardiff; Vizard, Oldham, Crowder & Cash, for Spencer & Evans, Cardiff.*

J. L. D.

BENNETT J.
1930
Oct. 21, 22; *Dec.* 18.

In re WINDERMERE DISTRICT GAS AND WATER ACTS, 1862 TO 1928.

WINDERMERE DISTRICT GAS AND WATER COMPANY *v.* WHITEHEAD.

[1930. W. No. 2058.]

Company—Statutory company—Winding-up—Rights of preference shareholders—Resolution—Validity—Windermere District Gas and Water Acts, 1862 *to* 1928*—Windermere Urban District Council Act* (19 *&* 20 *Geo.* 5, *c. lii.*), *ss.* 5, 18*—Companies Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 118), *Part II.*

A statutory company, under its special Acts with which Part II. of the Companies Clauses Act, 1863, was incorporated, issued certain preference shares. By the conditions endorsed on the certificates it was provided that, in the event of the company being wound up, the holders of the preference shares should be entitled to have the surplus assets applied, in the first place, in repaying to them the amount paid up on their preference shares, but should not be entitled to any further participation in such surplus assets.

Held, that ss. 13 and 14 of the Companies Clauses Act, 1863, limited a company to which Part II. of that Act applied in respect of their powers to attach rights of dividend to their preference shares, but did not limit a company in respect of their powers to attach other privileges; that the privilege of having a priority as regards repayment of capital in a winding-up was a privilege which the company was entitled to attach to the preference shares; and that, consequently, the further condition restricting the holders of preference shares in the case of a winding-up to repayment out of the surplus assets of the capital paid up on such shares was not ultra vires and was not invalid.

ORIGINATING SUMMONS.

The following facts are substantially as stated in his Lordship's judgment:—

The plaintiff company was incorporated by the Windermere District Gas Act, 1862, with a capital of 10,000*l.* divided into 1000 shares of 10*l.* each with the object of supplying gas within certain townships in the parish of Windermere. In the year 1869 they were empowered by the Windermere District Waterworks Act, 1869, to sell and supply water within the limits within which they had been authorized to supply gas. Sect. 6 of the Act is as follows: "The capital of the company for the purposes of the waterworks shall be 7500*l.*, subject to augmentation as hereinafter provided, and the company may from time to time raise, by the creation and issue of new ordinary shares of 10*l.* each, any sums not exceeding in the whole the amount of the said capital, and the new shares so from time to time created shall be called, and the certificates for the same shall be marked, 'Windermere District Waterworks Shares.'" Sect. 10 provides that: "In addition to the capital of 7500*l.* by this Act hereinbefore authorised to be created by shares, and when the same is fully paid up, it shall be lawful for the company, with the consent of three-fifths of the votes of the shareholders present in person or by proxy at any general meeting of the company specially convened for the purpose, from time to time to raise, by the creation and issue of new ordinary or preference shares, any further sum or sums of money not exceeding in the whole the sum of £7500 pounds; and all the provisions of this Act with respect to the Windermere District Waterworks shares, and the holders thereof, shall extend and apply to the last mentioned new shares and the holders thereof; and Part II. (relating to additional capital) of the Companies Clauses Act, 1863, is incorporated with and forms part of this Act, so far as relates to the additional capital by this section authorised to be created: Provided always, that the expression 'the ordinary shares,' in s. 17 of the said Act, shall be deemed and construed to mean the ordinary shares created under the authority of this Act." Sect. 18 provides that: "The company shall from time to time keep a separate account, to be called the gasworks account, and all moneys which shall come to the hands of the company in respect of gas supplied by them, or of coke or other residuum disposed of by them, or from any other source whatever connected with or relating to the gasworks, or payable to the gasworks account, or from any penalties recovered by them under the provisions of the Gasworks Clauses Act, 1847, shall fall into and form part of the gasworks account, and shall, except as regards capital, be applicable as part thereof." Sect. 19 provides: "The gasworks account shall be applied and disposed of as follows: that is to say. First, in payment of all expenses exclusively relating to the gasworks: Secondly, in payment of such proportion of the general expenses of the company as the directors of the company shall from time to time think proper to charge to the gasworks account: Thirdly, in payment of the interest on the moneys from time to time borrowed by the company under the authority of the Act of 1862: Fourthly, in or towards payment of dividends on the capital of the company created under the authority of the Act of 1862, in accordance with the provisions of the Gasworks Clauses Act, 1847, and in making up the deficiency of any previous dividend on the gas shares, and in providing a reserved fund in accordance with the provisions of the last named Act: And, lastly, the balance (if any) shall be carried to the waterworks account." Sect. 20 provides for keeping a separate account to be called the waterworks account, and s. 21 provides that "the waterworks account shall be applied and disposed of as follows: (that is to say,) First, in payment of all expenses exclusively relating to the waterworks: Secondly, in payment of such proportion of the general expenses of the company as the directors of the company shall from time to time think proper to charge to the waterworks account: Thirdly, in payment of the interest and dividend on the mortgages and debenture stock from time to time granted and issued by the company on the waterworks under the authority of this Act: Fourthly, in or towards payment of dividends on the capital of the company raised for waterworks purposes, in accordance with the provisions of the Waterworks Clauses Act, 1847, and in making up the deficiency of any previous dividends on the waterworks shares, and in providing a reserve fund, in accordance with the provisions of the last named Act: Lastly, the balance (if any) shall be divided equally between the gasworks account and the waterworks account, subject to the liability of the company to make such a rateable reduction in the rates chargeable by the company for the supply of gas and water as is provided for in that behalf by the Gasworks Clauses Act, 1847, and the Waterworks Clauses Act, 1847, respectively."

In the year 1889 the Windermere District Gas and Water Act, 1889, was passed. By s. 3 thereof it was, amongst other things, provided that Part II. of the Companies Clauses Act, 1863, was to be incorporated with and form part of this Act. Sect. 7 of the Act provides: "The company may from time to time raise (in addition to their present capital) any further capital for the Gas Undertaking of the company not exceeding in the whole 17,500*l.* and any further capital for the Water Undertaking of the company not exceeding in the whole 15,000*l.* by the creation and issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively but the company shall not issue any shares of less nominal value than 10*l.* nor shall any such share or stock vest in the person or Corporation accepting the same unless and until the full nominal amount of such shares or stock (if such share or stock be issued at or above par) together with any premium obtained upon the sale thereof shall have been paid in respect thereof. Provided that it shall not be lawful for the company to create and issue under the powers of this Act any greater nominal amount than shall be sufficient to produce including any premiums which may be obtained on the sale thereof the sum of 17,500*l.* for the Gas Undertaking or the sum of 15,000*l.* for the Water Undertaking."

In the year 1912 the Windermere District Gas and Water Act, 1912, was passed and again Part II. of the Companies Clauses Act, 1863, was incorporated into the Act. Sect. 5 of the Act gives power to the company to raise additional capital for the Water Undertaking of the company not exceeding in the whole 7500*l.* by the creation or issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively with a provision that the company shall not issue any share of less nominal value than 10*l.* Sect. 6 provides that: "Subject to the provisions of this Act the additional capital created by the company under this Act shall be part of the waterworks capital of the company and the new shares or stock therein and the holders thereof respectively shall be subject and entitled to the same powers provisions liabilities rights privileges and incidents whatsoever in all respects as if such additional capital were part of the now existing waterworks capital of the company and the new shares or stock were shares or stock in that capital Provided that except as otherwise expressly provided by the resolution creating the same no person shall be entitled to vote in respect of any new shares or stock to which a preferential dividend shall be assigned." Sect. 7 provides that: "Subject to the provisions of this Act every person who becomes entitled to any such new shares or stock shall in respect to the same be a holder of shares or stock in the company and shall be entitled to a dividend with the other holders of shares or stock of the same class or description proportioned to the whole amount of such new shares or stock."

In the year 1928 the Windermere District Gas and Water Act of 1928 was passed. That Act contains in the preamble a recital that a statement of the authorized share and loan capital of the company is set forth in the First Schedule to the Act and also that it was expedient to raise further capital for the general purposes of the undertaking of the company. It incorporated Part II. of the Companies Clauses Act, 1863. By s. 82 it was provided that: "The company may from time to time raise additional capital for the water undertaking not exceeding in the whole 12,000*l.* by the creation and issue of new ordinary shares or stock or new preference shares or stock or wholly or partially by one or more of those modes respectively." By s. 83: "Except as is by this Act provided the capital in new shares or stock created by the company under this Act and the new shares or stock therein and the holders thereof respectively shall be subject and entitled to the same powers provisions liabilities rights privileges and incidents whatsoever in all respects as if that capital were part of the now existing capital of the company of the same class or description and the new shares or stock were shares or stock in that capital." Sect. 98 amends s. 19 of the Act of 1869 by providing that "s. 19 (Application of Gasworks Account) of the Act of 1869 shall be read and have effect as if the following paragraph were substituted for the last two paragraphs of that section namely: 'Fourthly—In or towards payment of dividends at the authorised rates on the capital of the gas undertaking of the company as from time to time existing' and the said section as so amended shall apply in relation to all the gasworks of the company as from time to time existing and in respect of all moneys from time to time borrowed or raised by the company for the purposes of the gas undertaking." Sect. 127 provides: "(1.) If the Urban District Council of Windermere (in this section referred to as 'the Council') shall introduce in the next Session of Parliament a Bill for an Act to empower them to purchase the undertaking of the company and shall bona fide promote the same the company shall not oppose such Bill except in so far as they may deem necessary in order to secure the insertion therein of provisions in accordance with this section to protect their interests with respect to the sale and purchase provided for by this section and to provide for the winding up of the company. (2.) If the Council obtain such an Act authorising such purchase they shall as from the quarter day next after the expiration of four months after the passing of such Act purchase and the company shall sell and transfer to the Council for the price or for the consideration of 74,000*l.* the undertaking of the company freed from any then existing debenture mortgage or other debts or similar liabilities of the company but subject to any other obligations of the company under the Acts of Parliament relating to the company. (3.) The said Bill shall provide that as from the said quarter day all obligations of the company with reference to the supply of gas and water shall cease and determine." In the First Schedule is a statement in tabular form of the then issued capital of the company, the table specifying the preference and ordinary shares authorized and issued and referring to the particular Act under the authority of which the shares had been issued.

In the year 1929 there was passed the Windermere Urban District Council Act, which provides by s. 5 as follows: "(1.) The company shall sell"—the company is the plaintiff company here—"and the Council shall purchase as a going concern as from the appointed day the undertaking of the company freed from any then existing debenture mortgage or other debts or similar liabilities of the company. (2.) The consideration for the sale and purchase shall be (i.) the payment by the Council to the company on the appointed day of the sum of 74,000*l.*; (ii.) the repayment to the company of any capital expenditure in respect of the works of the company incurred after the 24th day of April 1928 with the consent of the Council; (iii.) the repayment to the company of any sums paid for the purchase of the waterworks lands and appurtenances thereto described in the schedule to the agreement or set forth in the Second Schedule to the Act of 1928 (in this section referred to as 'the scheduled agreement'); and (iv.) the assumption by the Council of any obligations of the company under the Acts of Parliament relating to the company other than debenture mortgage or other debts or similar liabilities." Sect. 18 provides that: "From and after the transfer all obligations of the company with reference to the supply of gas and water shall cease and determine and from and after the transfer the company shall continue to exist only for the purpose of receiving and recovering the sums payable to the company under this Act and distributing or otherwise applying the same and of winding-up the affairs of the company and carrying into effect the purposes of this Act so far as they relate to the company." Sub-s. 2 of s. 18 provides that: "As soon as may be practicable after the transfer the directors of the company shall proceed to wind up the affairs of the company and shall distribute the net moneys of the company after defraying the expenses of winding-up the company and any outgoings incidental thereto amongst the shareholders of the company and for that purpose the several persons whose names shall appear in the books of the company at the time of the transfer to be the proprietors of shares therein shall unless the contrary be proved to the satisfaction of the directors be considered to be shareholders of the company."

The company have received consideration of 74,000*l.* from the Windermere Urban District Council and in addition to that sum have in hand certain other assets not included in the sale and amounting in respect of the gas undertaking to 3838*l.* 12*s.* and in respect of the water undertaking to 1625*l.* 18*s.* 8*d.* The issued share capital of the company is as follows: In respect of the gas undertaking 18,500*l.* made up of 100 10*l.* fully paid 4 per cent. preference shares; 500 10*l.* fully paid 6 per cent. preference shares and 1000 10*l.* fully paid ordinary shares and 250 10*l.* fully paid new ordinary shares. In respect of the water undertaking the share capital is 24,100*l.* made up as follows: 150 10*l.* fully paid 4 per cent. preference shares; 400 10*l.* fully paid 6 per cent. preference shares; 863 10*l.* fully paid ordinary shares; 637 10*l.* fully paid ordinary shares and 1800 2*l.* new ordinary shares. There were two issues of preference shares for the purpose of obtaining new capital for the gas undertaking, one in 1910 and the other in 1925; and at the same time there were issues of preference shares in order to obtain new capital for the water undertaking. Upon the occasion of each issue resolutions were passed by the company creating the new preference shares and by the directors authorizing their issue. As regards the gas undertaking the first issue of preference shares was created at an extraordinary general meeting of the company held on August 30, 1910, and at that meeting it was resolved: "That under and by virtue of the powers conferred by the Windermere District Gas and Water Act 1889 the capital of the water undertaking of the company be increased by the sum of 3000*l.* by the creation of 300 new shares of 10*l.* each. That the new shares be called 'Windermere District Waterworks Preference shares' and that the holders thereof be entitled to a preferential dividend at the rate of 4*l.* per centum per annum on the capital paid up thereon, payable as regards each year out of the profits of that year without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. That in the event of the company being wound up the holders of the said Windermere District Waterworks preference shares be entitled to have the surplus assets of the water undertaking of the company, applied in the first place in repaying to them the amount paid up on the preference shares held by them respectively, but shall not be entitled to any further participation in such surplus assets. That all the said preference shares be issued at such time or times, in such manner, and upon such terms and conditions (subject to the provisions of the said Act) as the directors of the company may from time to time determine." On the same day the directors passed a resolution that 100 Gasworks preference shares of 10*l.* each be offered for sale by tender at the minimum price of 10*l.* per share. In the year 1925 the company passed a resolution creating 500 6 per cent. preference shares of 10*l.* each. The resolution was: "That under and by virtue of the powers conferred by the Windermere District Gas and Water Act 1889 the capital of the gas undertaking of the company be increased by the sum of 5000*l.* by the creation of 500 new preference shares of 10*l.* each, that such new shares be called 'Windermere District Gasworks 6 per cent. preference shares,' and that the holders of the said preference shares be entitled, subject to the rights of the holders of the 100 4 per cent. 10*l.* Gasworks preference shares issued in 1910, to a preferential dividend at the rate of 6*l.* per centum per annum on the capital paid up thereon, payable as regards each year out of the profits of that year without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. That in the event of the company being wound up the holders of the said Windermere District Gasworks 6 per cent. preference shares shall be entitled, subject to the rights of the holders of the 100 4 per cent. 10*l.* Gasworks preference shares issued in 1910, to have the surplus assets of the Gas Undertaking of the company applied in repaying to them the amount paid up on their preference shares, but shall not be entitled to any further participation in such surplus assets." On the same day the directors passed a resolution for the issue of 500 6 per cent. preference shares, that the minimum price below which no tender be accepted for the 500 Windermere Gasworks 6 per cent. preference shares be fixed at 10*l*. per share. The 4 per cent. Waterworks preference shares were created on August 30, 1910, by the company, the rights attached to them being similar to the rights attached to the Gasworks shares as regards the dividend and as regards their right to repayment of the capital in a winding-up, and on the same day the issue of 150 of the 4 per cent. preference shares of the Waterworks was authorized by the directors. On July 7, 1925, the company created 400 6 per cent. preference shares in respect of their Waterworks undertaking, and to those shares were attached the same rights as were attached to the 6 per cent. preference shares created for the purpose of the Gasworks undertaking. In respect of the Waterworks preference shares and the Gasworks preference shares the company issued certificates. The certificates for the 4 per cent. Gasworks shares had endorsed upon them a statement in these terms: "The registered holders of these shares will be entitled to a preferential dividend at the rate of 4 per cent. per annum on the capital paid up thereon, payable as regards each year out of the profits of that year, without any right in case of deficiency to resort to subsequent profits or to any other funds of the company. In the event of the company being wound up the registered holders of the said shares will be entitled to have the surplus assets of the gas undertaking of the company applied, in the first place, in repaying to them the amount paid up on the preference shares held by them respectively, but will not be entitled to any further participation in such surplus assets." The certificates for the Gasworks 6 per cent. preference shares had endorsed on them a statement in the same form. Similarly the certificates for the Waterworks 4 per cent. preference

BENNETT J.

1930

WINDERMERE DISTRICT GAS AND WATER ACTS, 1862 TO 1928, *In re.* WINDERMERE DISTRICT GAS AND WATER CO. *v.* WHITEHEAD.

shares and the certificates for the Waterworks 6 per cent. preference shares had endorsed on them a statement to the same effect.

On those facts the originating summons by question 3 asks: "Whether on the true construction of the above mentioned Acts and in the events which have happened the holders of the preference shares in the said gas and water undertakings respectively are entitled to participate to any and what extent in the surplus sale assets."

Cecil Turner for the applicants.

C. R. R. Romer for the holders of Gas preference shares. The company, being a statutory company, is not in a position to issue capital upon terms not specially authorized by the special Acts or by Acts incorporated therewith. Sect. 13 (1) of the Companies Clauses Act, 1863, makes provisions in respect of preference shares. Those provisions relate exclusively to dividends. The issue of the preference shares is valid, but the conditions attaching to the capital are not good and should be rejected. The preference shareholders take in the same way as if they were ordinary shareholders, and are consequently entitled to share in the surplus assets in the same way as the ordinary shareholders.

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(1) Sect. 13 of the Companies Clauses Act, 1863, provides: "Where any such company is authorised by any Special Act hereafter passed and incorporating this Part of this Act to raise any additional sum or sums by the issue of new preference shares, or by the issue of new preference stock, or (at the option of the company) by either of those modes,—then and in every such case the company, with the like sanction as aforesaid, may for the purpose of raising such additional sum or sums from time to time create and issue, (according as the authority given by the Special Act extends to shares only, or to stock only, or to both) such new shares or new stock, either ordinary or preference, and either of one class and with like privileges, or of several classes and with different privileges, and of the same or different amounts, and respectively with any fixed, fluctuating, contingent, preferential, perpetual, terminable, deferred, or other dividend or interest, not exceeding the rate prescribed in the Special Act, and, if no rate is prescribed, then not exceeding the rate of five pounds per centum per annum, and subject (as to any such new shares) to the payment of calls of such amounts and at such times, as the company from time to time thinks fit: Provided always, that any preference assigned to any shares or stock so issued under the Special Act shall not affect any guarantee or any preference or priority in the payment of dividend or interest on any shares or stock, that may have been granted by the company under or confirmed by any previous Act, or that may be otherwise lawfully subsisting." Sect. 14 is in the following terms: "The preference shares or preference stock so issued shall be entitled to the preferential dividend or interest assigned thereto, out of the profits of each year, in priority to the ordinary shares and ordinary stock of the company; but if in any year ending on the day prescribed in the special Act, and, if no day is prescribed, then on the thirty-first day of December, there are not profits

Beebee for the holders of Water preference shares referred to *Ashbury Railway Carriage and Iron Co.* v. *Riche.* (1)

Waite for the holders of Gas ordinary shares. The relevant sections of the Companies Clauses Act, 1863, are put in for the protection of the ordinary shareholders, so that if preference shares are created undue preference may not be given to the preference shareholders: *Collaroy Co.* v. *Giffard.* (2)

Gerald Upjohn (*Wilfrid Hunt* with him) for the holders of Water ordinary shares. If the conditions endorsed on the preference shares are valid there is nothing to prevent the issue of a share on condition that the shareholder shall not claim more than the return of his capital. The preference shareholders must be treated as having the rights of ordinary shareholders unless they expressly renounce those rights.

[He referred to *Birch* v. *Cropper* (3); *In re Home and Foreign Investment and Agency Co.* (4)]

Cur. adv. vult.

Dec. 18. BENNETT J. The plaintiffs (hereinafter called "the company") have sold their undertaking to the Windermere Urban District Council in pursuance of the provisions of the Windermere Urban District Council Act, 1929, and have received the purchase money payable by the Council under that Act and are now in the process of winding up their affairs in accordance with the provisions of s. 18 of that Act.

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available for the payment of the full amount of preferential dividend or interest for that year, no part of the deficiency shall be made good out of the profits of any subsequent year, or out of any other funds of the company."

(1) (1875) L. R. 7 H. L. 653, 693.
(2) [1928] Ch. 144, 163.
(3) (1889) 14 App. Cas. 525.
(4) [1912] 1 Ch. 72.

It is estimated that, after all the liabilities of the company have been discharged and after there has been returned to all the holders of the company's shares the capital paid up on such shares, there will be a surplus amounting in round figures to 25,000*l.* subject to the costs of winding-up, and the main question raised by the summons now before the Court is as to how this surplus ought to be distributed, there being a contest between the preference shareholders on the one side and the ordinary shareholders on the other, as to the right of the former to participate in the surplus.

The question, I think, turns entirely on whether the rights attached to the preference shares at the time of their issue were rights which the company had power to attach. If they were, then the holders of the preference shares having had repaid to them all the capital paid up on such shares have no right in respect thereof to participate in the surplus assets. [His Lordship stated the facts and the material statutory provisions, and continued :] The argument that the preference shareholders are entitled to participate in spite of the express terms of the resolution creating them and the terms endorsed on the certificates has as its foundation the provisions of s. 13 of the Companies Clauses Act, 1863, that section being one of the sections in Part II. of that Act and so incorporated into the company's special Acts of 1869, 1889, 1912 and 1928. [His Lordship read ss. 13 and 14 of the Companies Clauses Act, 1863, and continued :] The argument for the preference shareholders is that the conditions attached to their preference shares giving them the right in a winding-up to have the surplus assets applied in the first place in repaying to them the amount paid up on the preference shares held by them respectively and excluding them from any right to participate further in the surplus assets are ultra vires and invalid, because the privilege is one which is not authorized by the special Acts or by Part II. of the Companies Clauses Act, 1863.

The proposition is that the company having been incorporated by special Act of Parliament cannot issue their capital otherwise than upon terms or subject to conditions either expressly or by necessary implication authorized by their special Acts or the public Acts incorporated therewith. This proposition is, I doubt not, well established. But in my judgment the company were authorized by s. 13 to attach to their preference shares the privileges which have in fact been attached to them. The section enables a company authorized by any special Act thereafter passed and incorporating Part II. of the Act to raise any additional sum or sums by the issue of new preference shares or preference stock, or by either of those modes to do certain things. The company is such a company. The things such a company is authorized to do include a power to issue new preference shares with privileges the nature of which are not defined and also with any fixed, fluctuating, contingent, preferential, perpetual, deferred or other dividend or interest not exceeding the rate prescribed in the special Act, and if no rate is prescribed then not exceeding the rate of 5*l.* per centum per annum. Sect. 14 of the Act prevents a company from making the preference dividend a cumulative one. The sections, as it seems to me, draw a distinction between a privilege and a preferential dividend and limit a company to which Part II. of the Act applies in respect of their powers to attach rights of dividend to their preference shares, but do not limit a company in respect of their powers to attach other privileges. It seems to me, therefore, that the privilege of having a priority as regards repayment of capital in a winding-up is a privilege which the company are entitled to attach to the preference shares, and this being so I can see no ground upon which I ought to hold that the further condition restricting the holder of a preference share in the case of a winding-up to repayment out of the surplus assets of the capital paid up on such shares is ultra vires and void.

The result, therefore, in my judgment is that the answer to question 3 [the question above set out] is in the negative.

Solicitors: *Gregory, Rowcliffe & Co., for George Gatey & Son, Windermere.*

J. L. D.

MAUGHAM J.

1930 Dec. 18, 19.

1931 Jan. 21.

In re VICKERY.

VICKERY *v.* STEPHENS.

[1930. V. 398.]

Principal and Agent—Administration—Agent employed by Executor—Losses due to Employment of Agent—Liability of Executor—Meaning of "Wilful Default"—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 23, *sub-ss.* 1, 3; *s.* 30, *sub-s.* 1.

The plaintiffs were the two sons of a testatrix, entitled in equal shares to her estate undisposed of by her will, including 214*l.* 14*s.* 5*d.* in the Post Office Savings Bank and 62*l.* 4*s.* in Savings Certificates. The defendant, as sole executor of the testatrix, employed to wind up her estate a solicitor who, unknown to him, had at one time been suspended from practice, and who obtained from the first plaintiff the Post Office Savings Bank deposit book and the Savings Certificates. The defendant heard for the first time of the solicitor's suspension three months later, when the first plaintiff told him of it. Under the defendant's written authority, a warrant valued at 62*l.* 4*s.* had been issued in favour of the solicitor's firm, and the first plaintiff wrote to the defendant objecting to his having taken that course. Later, the first plaintiff asked the defendant to employ another solicitor, but the defendant did not do so, as the solicitor was then promising to settle the matter. Ultimately the solicitor absconded, and the sums of 214*l.* 14*s.* 5*d.* and 62*l.* 4*s.* were not recovered. In an action by the plaintiffs for a declaration that the defendant was guilty of a breach of trust in permitting the sums to be retained by the solicitor, and for payment of them, the defendant in his defence relying upon s. 23 of the Trustee Act, 1925:—

Held, (i.) that s. 23, sub-s. 1, of the Trustee Act, 1925, authorized the defendant in signing the authorities to the solicitor's firm to collect the sums:

(ii.) that by virtue of s. 30, sub-s. 1, of the Act, trustees are not liable for losses due to the default of "any banker, broker or other person with whom any trust money or other securities may be deposited" unless the losses are caused by the trustees' own wilful default:

(iii.) that an executor employing an agent to receive moneys belonging to the estate and relying on s. 23, sub-s. 1, of the Trustee Act, 1925, will not be liable if the money is lost through the agent's misconduct, unless the executor has himself been guilty of wilful default:

(iv.) that the defendant was guilty only of an error of judgment which, where losses are due to a solicitor's dishonesty, does not amount to "wilful default" on the part of an executor.

In re City Equitable Fire Insurance Co. [1925] Ch. 407 followed.

Learoyd v. *Whiteley* (1887) 12 App. Cas. 727 and *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A. C. 373 referred to.

MAUGHAM J.

1930

VICKERY, *In re.*

VICKERY *v.* STEPHENS.

ACTION.

The following statement of facts is taken from his Lordship's considered judgment :—

This is an action for breach of trust brought by two beneficiaries under the will of Emma Vickery, deceased, against the sole executor, Mr. Jonah Stephens, and, although the sums involved are not large, the question is of considerable importance to the two parties. The evidence is conflicting, and the law as the result of certain legislation is not altogether clear.

By her will dated January 27, 1925, the testatrix Emma Vickery appointed the defendant to be sole executor, directed payment of her debts and funeral expenses, and made certain specific bequests, but did not dispose of the residue of her estate. The testatrix died a widow on December 27, 1926, and her will was proved by the defendant, who in fact was the draftsman of it. The plaintiffs are the two sons of the testatrix and are entitled in equal shares to the estate not disposed of by her will.

The estate in question included a sum of 100*l.* 4½ per cent. War Stock, as to which no question arises in the action, the sum of 214*l.* 14*s.* 5*d.* in the Post Office Savings Bank, and the sum of 62*l.* 4*s.* in Savings Certificates.

The defendant Mr. Stephens had spent his life as a missionary in the city of London and he was completely ignorant of business affairs. In the first instance he conceived that he could wind up this simple estate without the assistance of a solicitor, but after one or two unsuccessful attempts to prepare an affidavit for Inland Revenue he gave up the attempt and went to a solicitor called Henry H. Jennens, who was carrying on business as Jennens & Jennens at 189 Kentish Town Road, in the immediate neighbourhood of the defendant's home, and also at three other places. The defendant had no particular reason except that of proximity to go to this firm, but he says he had seen the name for years on the door and he thought that to go to a solicitor near by would tend to expedite the business. He had indeed seen Mr. Jennens once before, but was not a friend of his. Mr. Jennens succeeded in obtaining a grant of probate to the defendant on May 19, 1927. In the meantime he obtained from the plaintiff Richard Vickery the title deeds of a house which was part of the estate, the certificates for the War Stock and for the Savings Certificates, and the Post Office Savings Bank deposit book and certain policies; and he also got from Mr. Vickery 20*l.* on account of the estate duty and fees. I pause here to say that, according to the plaintiff Richard Vickery, when he was told by the defendant that the latter had spoken to Jennens and proposed to employ him, he complained bitterly, and said that the name of Jennens, to use his own word, "stank" in the neighbourhood, and added that Jennens had been struck off the rolls in a probate case, and that on appeal he had been suspended from practice for five years. The plaintiff Richard Vickery says that notwithstanding these warnings the defendant insisted on employing Jennens to obtain probate, and that he again violently protested. The defendant absolutely denies these assertions, and says that when he informed the plaintiff Richard Vickery that he had gone to Jennens, the plaintiff stated that he was pleased and that his mother had at one time proposed to get Mr. Jennens to make her will. I find as a fact that the statements of Mr. Richard Vickery in this respect are not correct, and I believe those of the defendant. Mr. Richard Vickery I think is stating the substance of what took place at a much later interview which I will come to in due course. I will add that if Mr. Richard Vickery's recollection of what he said was correct it is impossible to understand his conduct in sending to Mr. Jennens direct documents which could be turned into money, and Treasury notes for 20*l.* on account of the estate duty and fees.

As I have said, probate was obtained on May 19, 1927. The defendant, who was in bad health, does not appear to have seen any great reason for expedition; but at the end of July, or it may be on August 1, 1927, the plaintiff Richard Vickery came to the defendant and asked him if the latter had heard anything about Jennens. On the defendant replying that he had heard nothing, the plaintiff

Richard Vickery stated that he had been suspended for six months for assaulting a solicitor; but that the six months must be up, since Jennens was practising again. That, I am satisfied, was the first intimation that the defendant had that Mr. Jennens was not altogether a satisfactory person to employ as a solicitor. It will, however, be noted that, on the statement of the defendant in this respect, which I accept, there was no special reason for thinking that Mr. Jennens was a dishonest man, whatever reflections might be made in relation to his temper or conduct. However, not long after, the plaintiff Richard Vickery, who had been making further inquiries with regard to Jennens, ascertained that Jennens on a previous occasion had been struck off the rolls by the Law Society, but that on appeal he had been suspended for five years, and he informed the defendant of this at a date which has not been established to my satisfaction. On August 8, it seems that the defendant began to press Mr. Jennens to complete administration of the estate. On August 12, the firm replied that they would do what they could to expedite a settlement of the matter. On August 22 the defendant wrote to Mr. Richard Vickery to say that his doctor had ordered him absolute quiet and rest and that he was going away for an indefinite period, and he adds this: "I have written to Jennens and told him I have authorized you to act in my stead concerning the settlement of your business, therefore to communicate with you as soon as things are ready." I do not think it possible that before this date the defendant had been informed by Mr. Richard Vickery of any fact leading him to suppose that in the opinion of the latter Mr. Jennens was unworthy of any confidence. The plaintiff Richard Vickery, however, ascertained by an inquiry from the authorities that a warrant valued 62*l.* 4*s.* was issued in respect of the Savings Certificates in favour of Jennens & Jennens under a written authority of the defendant, and he accordingly wrote on August 24 to the defendant in these terms: "Dear Sir,—I have received a letter from the Post Office that you gave a written order for the payment of the sum of 62*l.* 4*s.* made payable to Messrs.

Jennens & Jennens, and a warrant was sent to them on August 2, made payable through a bank. Have you made any more orders like this? You never told me about it, after I gave you strict instructions. Sorry to worry you. —I remain, Yours truly, R. Vickery."

It will be noted that, although the plaintiff Richard Vickery was objecting to such a course, he does not suggest that the matter should be taken out of the hands of Mr. Jennens, or, indeed, that any immediate steps were called for. There is a conflict as to what the "strict instructions" referred to in this letter, were. According to the defendant the instructions suggested were that the sums were to be entrusted to the plaintiff Richard Vickery himself. According to the latter, the phrase referred to the promise of the defendant not to do anything in relation to Jennens without consulting him; but the plaintiff Richard Vickery appears to have thought whilst giving evidence that the warrant was sent to Jennens on August 2 after he had informed the defendant of Jennens' doubtful record, and it is obvious that to have signed the warrant in favour of Jennens after such a disclosure would have been a strange step. Perhaps some importance may be attached to the words "Sorry to worry you" at the end of the letter; for if the plaintiff Richard Vickery's account in the box is to be believed, the defendant had acted throughout in a manner for which there was little excuse. The defendant, it appears, was away ill. On September 20, 1927, the plaintiff Richard Vickery, being by this time really anxious about the matter, went, accompanied by a solicitor's managing clerk, Mr. Philip Noakes, to see the defendant, and they had a long interview with him. Mr. Noakes urged the defendant to take the matter out of the hands of Jennens and gave him the name of another solicitor, and produced a form which would serve to effect a change of solicitors. The defendant was asked if he knew anything about Jennens, and the defendant admitted that the plaintiff Richard Vickery had said something derogatory to him at some prior date. I do not think, as Mr. Noakes alleged, that the defendant said that Mr. Jennens was his friend; for I am convinced that the defendant is a truthful person, and it is plain that Jennens was to him a stranger. It is apparent therefore that, on September 20, the plaintiff was urging the defendant to accept a change of solicitor: and I think it was then or about that time that the defendant was told of the charges of dishonesty which had been made in the past against Jennens. It must, however, be borne in mind that the defendant was being told by Jennens, who, whatever his past misdeeds, was still practising as a solicitor at several addresses, that there would be what he called a settlement in a very few days. The defendant himself said in the box that he thought that a change of solicitors might be like getting out of the frying pan into the fire. On October 7 the defendant wrote to Mr. Richard Vickery as follows: "Dear Mr. Vickery,—Have been down twice to business. This morning at 10 A.M. to sign for assignment of your house. Settlement on Wednesday or Thursday I believe for certainty.—Yours truly, J. Stephens. P.S.—I will send or see you immediately it is through. J. S."

He was repeatedly assured by Jennens that the matter would be completed at once. On October 14 the defendant wrote again to the plaintiff Richard Vickery: "Dear Mr. Vickery—I am pressing for an immediate settlement and I think it is close at hand. That is, in the course of a few days. I have never had to learn patience at such a cost, such is never forgotten and for me will never come again. —Yours truly, J. Stephens. Kind regards."

It will be noted that the plaintiff Richard Vickery and the defendant were still on good terms and other letters to the same effect passed between them. On November 22, 1927, after some letters which I do not think it necessary to transcribe, the defendant wrote to the plaintiff Richard Vickery as follows: "Dear Mr. Vickery,—I have signed the form and returned it with deposit book. The will is deposited at Somerset House as all wills are, but you can get a copy if you so desire. The probate is your legal document as to its provisions. I think his suggestion of sending your cheque, etc., was in consideration of my health, I don't know, as I had such a bad turn last night it will be best: so I have written him accordingly.—Yours truly, J. Stephens."

It appears from this that Jennens was promising an immediate cheque in settlement of the matter. The cheque however was not forthcoming, and early in December the defendant put the matter in the hands of Mr. J. M. Voss, a solicitor practising at 24 John Street, Bedford Row, who took immediate steps to press Mr. Jennens for a settlement. A number of letters passed: it proved impossible to obtain payment. The matter was reported to the Law Society. On January 7, 1928, the defendant issued an originating summons for an order upon Jennens for delivery of his bill of costs and cash account and taxation. The usual order was made thereon on February 6, 1928. The defendant Jennens did not comply therewith, and on May 4, 1928, an order was made on the usual motion, giving leave to issue a writ of attachment against Jennens. The writ was issued in due course; but Jennens evaded service for a time, and then absconded without having paid any part of the balance in his hands, and the sums of 214*l.* 14*s.* 5*d.* and 62*l.* 4*s.*, less, I think, certain costs and perhaps some small disbursements, have been wholly lost.

The writ in this action was issued on April 2, 1930, and the plaintiffs claimed a declaration that the defendant was guilty of a breach of trust in permitting the sums of 214*l.* 14*s.* 5*d.* in the Post Office Savings Bank and 62*l.* 4*s.* invested in the War Savings Certificates to be received and retained for upwards of a month by Jennens, and that he was liable to make good to the estate the sums lost by reason of that breach of trust with interest at 5 per cent.

L. W. Byrne for the plaintiffs. These losses have happened through the wilful default of the trustee. The plaintiff Richard Vickery repeatedly told the defendant what the record of Jennens was, and the defendant none the less continued to employ Jennens as his agent.

[He referred to *Speight* v. *Gaunt* (1) and *Wyman* v. *Paterson*. (2)]

P. M. Walters for the defendant. By s. 23, sub-s. 1, of the Trustee Act, 1925, a trustee may employ and pay an agent

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(1) (1883) 9 App. Cas. 1.

(2) [1900] A. C. 271.

MAUGHAM J.

1930

VICKERY, *In re.*

VICKERY *v.* STEPHENS.

to transact any business, including the receipt and payment of money, and will not be responsible for the agent's default if he has employed him in good faith. (1) This is a new provision. Formerly the onus was on the trustee in such a case to show that the appointment was one of moral necessity: *Speight* v. *Gaunt* (2); *In re Weall.* (3) Assuming that the

(1) Sect. 23, sub-s. 1: "Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith."

Sub-s. 3: "Without prejudice to such general power of appointing agents as aforesaid—

(*a*) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;

(*b*) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(*c*) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

"Provided that nothing in this sub-section shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

"This sub-section applies whether the money or valuable consideration or property was or is received before or after the commencement of this Act."

(2) (1883) 9 App. Cas. 1.

(3) (1889) 42 Ch. D. 674, 678.

proviso to sub-s. 3 of s. 23 applies in substance to sub-s. 1, the question of reasonable time arises: *Wyman* v. *Paterson* (1); *In re Gasquoine* (2); *Shepherd* v. *Harris.* (3) Under s. 30 of the Act, a trustee is not answerable or accountable for any loss unless it happens through his own wilful default. (4)

[He referred to *In re Brier* (5); *Robinson* v. *Harkin* (6); and *Wynne* v. *Tempest.* (7)]

A trustee can be relieved from personal liability if he has acted honestly and reasonably: *In re Lord De Clifford's Estate* (8); *In re Kay* (9); *In re Mackay* (10); *In re Allsop.* (11)

L. W. Byrne in reply.

Cur. adv. vult.

1931. Jan. 21. MAUGHAM J. [having stated the facts and his findings as to them, as set out above:] The question that arises is whether in the circumstances, and in view of my findings as to the facts, the defendant is liable to make good these sums with interest by reason of his negligence either in employing Jennens to receive the sums, or in permitting those sums to remain in his hands, in the circumstances of the case, for a longer period than was necessary.

In considering this question the Court has to bear in mind in particular two sections of the Trustee Act, 1925. Sect. 23, sub-s. 1, is as follows: [His Lordship read the sub-section, and continued:] This sub-section is new and, in my opinion, authorized the defendant in signing the authorities to Jennens & Jennens to collect the two sums in question; for

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(1) [1900] A. C. 271.

(2) [1894] 1 Ch. 470.

(3) [1905] 2 Ch. 310.

(4) Sect. 30, sub-s. 1: "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default."

(5) (1884) 26 Ch. D. 238, 243.

(6) [1896] 2 Ch. 415.

(7) [1897] W. N. 48; [1897] 1 Ch. 110.

(8) [1900] 2 Ch. 707.

(9) [1897] 2 Ch. 518.

(10) [1911] 1 Ch. 300.

(11) [1914] 1 Ch. 1.

MAUGHAM
J.

1931

VICKERY,
In re.
VICKERY
v.
STEPHENS.

I do not think it can be doubted that the defendant acted in good faith in employing Jennens for the purpose. It will be observed that the sub-section has no proviso or qualification to it such as we find in relation to s. 23, sub-s. 3. It is hardly too much to say that it revolutionizes the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not. No doubt he should use his discretion in selecting an agent, and should employ him only to do acts within the scope of the usual business of the agent; but, as will be seen, a question arises whether even in these respects he is personally liable for a loss due to the employment of the agent unless he has been guilty of wilful default.

Sect. 23, sub-s. 3, is in the following terms: [His Lordship read the sub-section and continued:] This sub-section is a reproduction with amendments of s. 17 of the Trustee Act, 1893, which replaced s. 2 of the Trustee Act, 1888. It will be observed that para. (*a*) of the sub-section relates to the production of a deed having endorsed thereon a receipt for money or other property, and that para. (*c*) refers to the receipt of money payable to the trustee under a policy of insurance. In these cases, no doubt, there is no reason why the banker or the solicitor should do anything more than receive the money and pay the same to the trustee or as he shall direct. The proviso must, I think, be limited to these two cases; and, of course, it is not intended to preclude a trustee from keeping trust funds at his bank pending investment or other proper use of them; and it has nothing to do, in my opinion, with the case I have to decide, in which the powers given by paras. (*a*) and (*c*) were not utilized by the defendant. There was no doubt a good reason for not making the proviso extend to sub-s. 1 of s. 23, since in many cases where, for example, a banker or other agent is employed by a trustee to receive money, the money cannot at once be conveniently paid to the trustee, but has to be employed by the banker or other agent in a number of ways.

I have now to consider s. 30, sub-s. 1, of the Trustee Act, 1925, a section which replaces s. 24 of the Trustee Act, 1893, which in its turn re-enacted Lord Cranworth's Act, s. 31. It is in the following terms: [His Lordship read the sub-section, and continued:] Reliance has been placed on the words concluding the sub-section "nor for any other loss, unless the same happens through his own wilful default." To avoid misconception I wish to say that, having regard to the numerous decisions since the enactment of Lord Cranworth's Act in relation to the liability of trustees for innocent breaches of trust, it is impossible now to hold that the words "for any other loss" are quite general, with the result that no trustee is ever liable for breach of trust unless the breach is occasioned by his own wilful default. In my opinion the words are confined to losses for which it is sought to make the trustee liable occasioned by his signing receipts for the sake of conformity or by reason of the wrongful acts or defaults of another trustee or of an agent with whom trust money or securities have been deposited, or for the insufficiency or deficiency of securities or some other analogous loss. It may be noted that if the phrase is not so limited it is difficult to see how there could have been any need for s. 3 of the Judicial Trustee Act, 1896, now re-enacted as s. 61 of the Trustee Act, 1925, or for s. 29 of that Act; nor would it be possible to explain the numerous cases before 1896 where trustees were made liable for honest mistakes either of construction or fact: see, for example, *Learoyd* v. *Whiteley* (1); *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* (2), and cases there cited.

On the other hand, since s. 30, sub-s. 1, expressly refers to the defaults of bankers, brokers, or other persons with whom any trust money or other securities may be deposited, I am unable—dealing here with the more limited case—to escape the conclusion that the trustee cannot be made liable for the default of such a person unless the loss happens through the "wilful default" of the trustee. Before considering the meaning of the words "wilful default" in this connection,

(1) 12 App. Cas. 727.

(2) [1905] A. C. 373.

MAUGHAM J.
1931
VICKERY, *In re.*
VICKERY *v.* STEPHENS.

I would observe that in the case of *In re Brier* (1) the Court of Appeal, consisting of Lord Selborne L.C., and Cotton and Fry L.JJ., gave effect to Lord Cranworth's Act, s. 31, and held the trustees and executors not liable inasmuch as it had not been established that the loss occasioned by the agent's insolvency (in a case where, as the law then required, it was shown that the employment of the agent was a proper one) was due to the wilful default of the trustees and executors.

Now the meaning of the phrase " wilful default " has been expounded by the Court of Appeal in the case of *In re Trusts of Leeds City Brewery, Ld.'s, Deed* (2), and in the case of *In re City Equitable Fire Insurance Co.* (3) It should be noted that in both those cases the indemnity, given to the trustees in the first case and to the directors and officers of the company in the second case, was worded in a general form so that it could not be contended that they were liable for any matter or thing done or omitted unless it could be shown that the loss so occasioned arose from their own wilful default. This, as I have said, is not true of an ordinary executor or trustee; but the exposition of the phrase " wilful default " is not the less valuable. The Court of Appeal held, following in the case of *In re City Equitable Fire Insurance Co.* (3) the decision of Romer J., that a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not. I accept with respect what Warrington L.J. said (4)—namely, that in the case of trustees there are definite and precise rules of law as to what a trustee may or may not do in the execution of his trust, and that a trustee in general is not excused in relation to a loss occasioned by a breach of trust merely because he honestly believed that he was justified in doing the act in question. But for the reasons which I have given I think that, where an executor employs a solicitor or other agent to receive money belonging to the estate in reliance on s. 23, sub-s. 1, of the Trustee Act, 1925, he will not be liable for a loss of the money occasioned by the misconduct of the agent unless the loss happens through the wilful default of the executor, using those words as implying, as the Court of Appeal have decided, either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty.

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(1) 26 Ch. D. 238.
(2) [1925] Ch. 532*n*.
(3) [1925] Ch. 407.
(4) Ibid. 524.

Returning to the facts of the present case, it should be noted that, having taken the step of employing a solicitor not merely to obtain probate and to wind up the estate, but also to collect the War Bonds, the sums in the Post Office Savings Bank, and the sums in Savings Certificates, the position was different from that of a trustee who has simply employed a solicitor or other agent to collect money; for the only practical way of compelling the solicitor to account in the circumstances under consideration was to require him by the usual process to deliver a bill of costs and cash account. This procedure, I may observe, is not a very effective one in the case of a fraudulent solicitor, since it lends itself in dishonest hands, as it did in the present case, to serious delay.

It is essential in this case to guard oneself against judging the conduct of the defendant in the light of subsequent events. To have employed a new solicitor as soon as the defendant became aware that H. H. Jennens was a person with a tarnished reputation for honesty would certainly have meant further costs. It might have proved quite unnecessary even on the supposition that Jennens was a rogue. Even a man of the world might have thought that the sum involved —the sum of 300*l*. or thereabouts—was far too small to make it probable that the solicitor would be likely—unless, indeed, in the case of stern necessity—for such a sum to expose himself to the orders of the Court and to the action of the Law Society. Nor must it be forgotten that upon the facts as I find them it was not till the month of September, 1927, that the defendant had any real reason for suspecting that Jennens was unworthy of confidence; and it seems that after that date he kept on pressing for an immediate settlement and kept on being assured that a settlement would immediately

MAUGHAM J.
1931
VICKERY, *In re.*
VICKERY *v.* STEPHENS.

take place. On the whole I have come to the conclusion that the defendant was on any view of the facts guilty only of an error of judgment, and this, in the case of a loss occasioned by the defalcations of a solicitor, does not amount to wilful default on the part of the executor. The action accordingly in my judgment fails and must be dismissed.

Solicitors: *Sandford & Co.; C. O. Humphreys & Son.*

K. R. A. H.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1931, will be as follows :—

In the First Series,
[1931] 1 Ch. [1931] 2 Ch.

In the Second Series,
[1931] 1 K. B. [1931] 2 K. B. [1931] P.

In the Third Series,
[1931] A. C.

INDEX.

ACKNOWLEDGMENT—Muniments of title —Sale of land by administrator—Letters of administration - 511
See Vendor and Purchaser 3.

ADMINISTRATION—Employment of solicitor by executor—Losses due to his employment—Liability of executor —Meaning of " wilful default " 572
See Principal and Agent.

—— *Insolvent Estate — Debt due to Executor — Retainer by Executor — Crown Debt—Priority— Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 34, 57, *Sch. I., Part I. — Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-s.* 1 (*a*).

In re Cockell. Jackson *v.* Att.-Gen. - - - **Clauson J. and C. A. 389**

2. —— *Order of Application of Assets—Solvent Estate of deceased Testator—" Real and Personal Estate "—Income accruing after death—" Property of deceased undisposed of by will "—Lapsed Share of Income—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 32, *sub-s.* 1; *s.* 34, *sub-s.* 3; *Schedule I., Part II., para.* 1.

In re Lamb [1929] 1 Ch. 722 approved and applied.
Decision of Clauson J. [1930] 2 Ch. 400 affirmed. *In re* Tong. Hilton *v.* Bradbury - - - - - **C. A. 202**

—— Specific bequests charged with all debts, funeral and testamentary expenses—Property primarily applicable to pay debts - - - - 443
See Will 7.

AMERICAN PATENT—Right to Convention Patent in England—Delay in applying due to war—Patent granted after war—Application for prolongation—Loss and damage due to war
See Patent. 68

ANNUITY—Bequest free of supertax—Surtax — Bequest operates free of surtax - - - - 77
See Will 5.

APPOINTMENT—General power—Will of donee — Residuary gift — Failure —Intention to exercise power—Intestacy - - - - 216
See Will 9.

ARTICLES OF ASSOCIATION—Construction —Private company—No restriction on power to transfer from one member to another - - 234
See Company 1.

—— Unusual article enabling one director and secretary to affix seal—Fraudulent issue of certificate by director — Holder's ignorance of article — Rectification of register - 496
See Company 2.

ASSETS — Order of application — Solvent estate—Income of residue—Lapsed share—Property undisposed of by will - - - - - 202
See Administration 2.

—— Power of appointment—Exercisable by deed with consent of trustees—General power—Equitable assets for payment of debts - - - 347
See Power of Appointment.

BANKRUPTCY — *Deed of Arrangement — Debtor indebted to Company in Liquidation—Proof by Liquidator — Debtor Surety for Advances made to Company—Claim by Trustee to set off Amounts guaranteed and proved for but not paid by Debtor—Principal Debtor and Surety—" Mutual Dealings "—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 31.

In re Fenton. *Ex parte* Fenton Textile Association, Ld. **Luxmoore J. and C. A. 85**

BANKRUPTCY—*continued.*

2. —— *High Bailiff—Notice of Bankruptcy Petition—Service—High Bailiff with Knowledge of Petition acquired as Registrar deemed served with Notice—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 41, *sub-s.* 2.
In re Harris
Clauson and Luxmoore JJ. 138

BOOK — Bequest of chattels including "books" as heirlooms—Manuscript letters inlaid into sheets bound in volumes - - - - **521**
See Will 1.

CASES :—

—— *Atkinson, In re* [1930] 1 Ch. 47.
Followed. *In re* Littlewood
Maugham J. 443

—— *Att.-Gen.* v. *Hanwell Urban Council* [1900] 2 Ch. 377.
Referred to. Att.-Gen. *v.* Manchester Corporation
Maugham J. 254

—— *Baily* v. *De Crespigny* (1869) L. R. 4 Q. B. 180.
Distinguished. Walton Harvey, Ld. *v.* Walker & Homfrays, Ld.
Bennett J. and C. A., 145, 274

—— *Bain, In re* [1930] 1 Ch. 224.
Distinguished. *In re* Stratton
C. A. 197

—— *Bally* v. *Wells* (1769) Wilmot, 341.
Distinguished. Grant *v.* Edmondson - - - - **C. A. 1**

—— *Barclay, In re* [1920] 2 Ch. 173.
Distinguished. *In re* Stratton
C. A. 197

—— *Barratt, In re* (1915) 31 Times L. R. 502.
Followed. *In re* Tomline's Will Trusts - **Maugham J. 521**

—— *Bensley* v. *Bignold* (1822) 5 B. & Ald. 335.
Followed. *In re* National Benefit Assurance Co., Ld.
Maugham J. 47

—— *Bolton Partners* v. *Lambert* (1889) 40 Ch. D. 293.
Discussed and distinguished. Watson *v.* Davies
Maugham J. 455

—— *Bowring, In re* (1918) 34 Times L. R. 375.
Applied. *In re* Hulton
Bennett J. 77

—— *Bradley* v. *Welsh* (1903) 88 L. T. 737.
Followed. Lock *v.* Bell
Maugham J. 35

—— *Brewster* v. *Kidgell* (1697) 12 Mod. 166. 170.
Dictum of Holt C.J. not followed, Grant *v.* Edmondson - **C. A. 1**

CASES—*continued.*

—— *Brightman & Co., Ld.* v. *Tate* [1919] 1 K. B. 463.
Followed. *In re* National Benefit Assurance Co., Ld. **Maugham J. 47**

—— *Campbell* v. *Hall* (1774) 1 Cowp. 204.
Discussed and distinguished. North Charterland Exploration Co. (1910), Ld. *v.* R. **Luxmoore J. 169**

—— *Chawner* v. *Cummings* (1846) 8 Q. B. 311.
Followed. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A. 310**

—— *City Equitable Fire Insurance Co., In re* [1925] Ch. 407.
Followed. *In re* Vickery
Maugham J. 572

—— *Cleaver* v. *Mutual Reserve Fund Life Assurance* [1892] 1 Q. B. 147, 157, 158.
Dicta of Fry L.J. discussed. *In re* Pitts - - - **Farwell J. 546**

—— *Cobbett* v. *Brock* (1855) 20 Beav. 524.
Followed. *In re* Lloyds Bank, Ld. - - - **Maugham J. 289**

—— *Cope* v. *Rowlands* (1836) 2 M. & W. 149.
Followed. *In re* National Benefit Assurance Co., Ld.
Maugham J. 47

—— *Corser* v. *Cartwright* (1875) L. R. 7 H. L. 731.
Followed. Parker *v.* Judkin
Maugham J. and C. A. 475

—— *Coslake* v. *Till* (1826) 1 Russ. 376.
Followed. Lock *v.* Bell
Maugham J. 35

—— *Cyclists' Touring Club* v. *Hopkinson* [1900] 1 Ch. 179.
Followed. Wimbledon and Putney Conservators *v.* Tuely
Bennett J. 190

—— *Davies Trusts, In re* (1871) L. R. 13 Eq. 163.
Discussed and distinguished. *In re* Vander Byl - **Luxmoore J. 216**

—— *Dunne* v. *Byrne* [1912] A. C. 407, 410.
Dictum of Lord Macnaghten applied. *In re* Stratton - - **C. A. 197**

—— *Farnsworth* v. *Garrard* (1807) 1 Camp. 38.
Applied. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A. 310**

—— *Folkestone Corporation* v. *Brockman* [1914] A. C. 338.
Followed. Att.-Gen. *v.* Manchester Corporation **Maugham J. 254**

—— *Forster* v. *Elvet Colliery Co.* [1908] 1 K. B. 629.
Followed. Grant *v.* Edmondson
C. A. 1

—— *Graigola Merthyr Co., Ld.* v. *Swansea Corporation* [1927] W. N. 30.
Distinguished. Frankenburg *v.* Famous Lasky Film Service, Ld.
C. A. 428

CASES—*continued.*

—— *Grant* v. *Edmondson* [1930] 2 Ch. 245. Affirmed - - - **C. A. 1**

—— *Grey* v. *Friar* (1854) 4 H. L. C. 565. Applied. Simons *v.* Associated Furnishers, Ld. - **Clauson J. 379**

—— *Hart* v. *Riversdale Mill Co.* [1928] 1 K. B. 176. Followed. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A. 310**

—— *Henson, In re* [1908] 2 Ch. 356. Followed. Parker *v.* Judkin **Maugham J. and C. A. 475**

—— *Houghton, In re* [1915] 2 Ch. 173, 178. Dicta of Joyce J. discussed. *In re* Pitts - - - **Farwell J. 546**

—— *Howes* v. *Bishop* [1900] 2 Q. B. 390. Distinguished. *In re* Lloyds Bank, Ld. - - - **Maugham J. 289**

—— *Huguenin* v. *Baseley* (1807) 14 Ves. 273. Applied. *In re* Lloyds Bank, Ld. **Maugham J. 289**

—— *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches* (1926) 136 L. T. 27. Distinguished. *In re* Hood **Bennett J. and C. A. 240**

—— *Joyner* v. *Weeks* [1894] 2 Q. B. 31. Followed. Terroni and Necchi *v.* Corsini - **Maugham J. 515**

—— *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742. Followed. *In re* National Benefit Assurance Co., Ld. **Maugham J. 47**

—— *Kempthorne, In re* [1930] 1 Ch. 268. Followed. *In re* Littlewood **Maugham J. 443**

—— *Lamb, In re* [1929] 1 Ch. 722. Approved and applied. *In re* Tong **C. A. 202**

—— *Learoyd* v. *Whiteley* (1887) 12 App. Cas. 727. Referred to. *In re* Vickery **Maugham J. 572**

—— *Lovesy* v. *Smith* (1880) 15 Ch. D. 655. Followed. *In re* Lloyds Bank, Ld. **Maugham J. 289**

—— *Masson, In re* (1917) 86 L. J. (Ch.) 753. Distinguished. *In re* Tomline's Will Trusts **Maugham J. 521**

—— *Milnes* v. *Branch* (1816) 5 M. & S. 411. Followed. Grant *v.* Edmondson **C. A. 1**

—— *Mondel* v. *Steel* (1841) 8 M. & W. 858. Applied. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A 310**

—— *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A. C. 373. Referred to. *In re* Vickery **Maugham J. 572**

—— *Page* v. *Horne* (1848) 11 Beav. 227. Followed. *In re* Lloyds Bank, Ld. **Maugham J. 289**

—— *Paterson* v. *Gas Light and Coke Co.* [1896] 2 Ch. 476. Distinguished. Granger *v.* South Wales Electrical Power Distribution Co. - **Bennett J. 551**

—— *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants' Marine Insurance Co.* [1928] 1 K. B. 750. Applied. Frankenburg *v.* Famous Lasky Film Service, Ld. - **C. A. 428**

—— *Plowden, In re* (1908) 24 Times L. R. 883. Followed. *In re* Tomline's Will Trusts - - **Maugham J. 521**

—— *Ropner & Co.* v. *Stoate, Hosegood & Co.* (1905) 92 L. T. 328, 332. Applied. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A. 310**

—— *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439. Applied. South London Greyhound Racecourses, Ld. *v.* Wake **Clauson J. 496**

—— *Sagar* v. *H. Ridehalgh & Son, Ld.* [1930] 2 Ch. 117. Reversed - - **C. A. 310**

—— *Scowcroft. In re* [1898] 2 Ch. 638. Followed. *In re* Hood **Bennett J. and C. A. 240**

—— *Sharp* v. *Hainsworth* (1862) 3 B. & S. 139. Applied. Sagar *v.* H. Ridehalgh & Son, Ld. - - - **C. A. 310**

—— *Smith, In re* [1915] 2 Ch. 216. Referred to. *In re* Littlewood **Maugham J. 443**

—— *Smith* v. *Mawhood* (1843) 14 M. & W. 452. Distinguished. *In re* National Benefit Assurance Co., Ld. **Maugham J. 47**

—— *Stickney* v. *Keeble* [1915] A. C. 386. Followed. Lock *v.* Bell **Maugham J. 35**

—— *Stratton, In re* [1930] 2 Ch. 151. Affirmed - - - **C. A. 197**

—— *Sykes* v. *Sykes* (1868) L. R. 3 Ch. 301. Applied. *In re* Forrest **Clauson J. 162**

—— *Tilley* v. *Thomas* (1867) L. R. 3 Ch. 61. Followed. Lock *v.* Bell **Maugham J. 35**

—— *Tong, In re* [1930] 2 Ch. 400. Affirmed - - - **C. A. 202**

—— *Walton Harvey, Ld.* v. *Walker & Homfrays, Ld.*, [1931] 2 Ch. 145. Affirmed - - - **C. A. 274**

CASES—*continued.*

—— *Whiting, In re* [1913] 2 Ch. 1. Doubted. *In re* Forrest **Clauson J. 162**

—— *Willis* v. *Curtois* (1838) 1 Beav. 189. Followed. *In re* Tomline's Will Trusts - - **Maugham J. 521**

—— *Zouch* (*Baroness*), *In re* [1919] 2 Ch. 178. Considered. *In re* Tomline's Will Trusts - - **Maugham J. 521**

CHARITABLE BEQUEST—Gift for spreading Christian principles and extinguishing drink traffic — Principal and ancillary objects—Validity - **240**
See Charity **2.**

—— To Vicar for time being of parish—"Parochial institutions or purposes"—Validity - - - **197**
See Charity **1.**

CHARITY—*Bequests to the Vicar for the time being of the Parish of M.—"Parochial institutions or purposes"— Validity.*

Dictum of Lord Macnaghten in *Dunne* v. *Byrne* [1912] A. C. 407, 410 applied. *In re Bain* [1930] 1 Ch. 224 and *In re Barclay* [1929] 2 Ch. 173 distinguished. Decision of Bennett J. [1930] 2 Ch. 151 affirmed. *In re* Stratton. Knapman *v.* Att.-Gen. - - - - **C. A. 197**

2. —— *Gift for spreading Christian Principles and extinguishing Drink Traffic—Principal and ancillary Objects— Validity.*

In re Scowcroft [1898] 2 Ch. 638 followed. *Inland Revenue Commissioners* v. *Temperance Council of Christian Churches of England and Wales* (1926) 136 L. T. 27 distinguished. *In re* Hood. Public Trustee *v.* Hood **Bennett J. and C. A. 240**

CHURCH OF ENGLAND—Presentation —Order on bishop to admit and license clerk to a benefice—Failure to obey —Writ to Archbishop commanding him to admit a proper person **529**
See Ecclesiastical Law.

CODICIL—Gift of residue to seven named legatees—Revocation in codicil of gift to two of the seven persons—Confirmation of will as modified—Intestacy - - - - **162**
See Will **6.**

COMPANY—*Private Company—Transfer of Shares—Power to transfer from one Member to another.*

Delavenne *v.* Broadhurst **Bennett J. 234**

2. —— *Share Certificate—Register of Members—Fraudulent Issue of Certificate by Director—Estoppel—Rectification of Register.*

The principle of *Ruben* v. *Great Fingall Consolidated* [1906] A. C. 439 applied. South London Greyhound Racecourses, Ld. *v.* Wake - - - **Clauson J. 496**

COMPANY—*continued.*

3. —— *Statutory Company—Winding Up —Rights of Preference Shareholders—Resolution— Validity—Windermere District Gas and Water Acts*, 1862 *to* 1928—*Windermere Urban District Council Act*, 1929 (19 *&* 20 *Geo.* 5, *c. lii.*), *ss.* 5, 18—*Companies Clauses Act*, 1863 (26 *&* 27 *Vict. c.* 118), *Part II.*

In re Windermere District Gas and Water Acts, 1862 to 1928. Windermere District Gas and Water Co. *v.* Whitehead **Bennett J. 558**

—— Supply of electricity—Debt—Receiver for debenture holders—Right to supply - - - - - **551**
See Electricity.

—— Weaving Trade—Deduction from wages for bad work—Term of contract—Practice of mill—Lancashire usage —Legality - - - - **310**
See Master and Servant.

—— Will—Devise and bequest of freeholds and business charged with annuity —Purchase by company—Undertaking by company to satisfy annuity—Subsequent issue of debentures—Liability of company and debenture holders - - **475**
See Will **3.**

4. —— *Winding Up — Insurance Companies—Participation Agreements (Inwards Treaty and Outwards Treaty)—No stamped Policies under Agreements—Winding Up of one Company—Proof by other—Alleged Payments of Premiums under Outwards Treaty subject to Deductions under Inwards Treaty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 92, 93, 97—*Marine Insurance Act*, 1906 (6 *Edw.* 7, *c.* 41), *s.* 84.

Bensley v. *Bignold* (1822) 5 B. & Ald. 335; *Cope* v. *Rowlands* (1836) 2 M. & W. 149; *Brightman & Co., Ld.* v. *Tate* [1919] 1 K. B. 463; and *Kearley* v. *Thomson* (1890) 24 Q. B. D. 742 followed. *Smith* v. *Mawhood* (1845) 14 M. & W. 452 distinguished. *In re* The National Benefit Assurance Co., Ld. - **Maugham J. 47**

CONDITION—Lease—Power to determine if "up to determination" lessees perform covenants—Notice to determine—Breach of covenant at date of notice remedied before its expiration - - - - - **379**
See Lease **1.**

CONSTITUTIONAL LAW—Powers of Crown in Protectorate — Powers exercisable by Order in Council - **169**
See Crown.

CONTRACT—*Impossibility of Performance—Electrically illuminated Advertisement—Erection and Maintenance on Building—Acquisition and Demolition of Building by Local Authority — Implied Condition — Damages — Limits of Assessment—Lands Clauses Acts—*

CONTRACT—*continued.*

Manchester Corporation Act, 1891 (54 *&* 55 *Vict. c. ccvii.*), *s.* 18, *sub-s.* 1—*Manchester Corporation Act,* 1920 (10 *&* 11 *Geo.* 5, *c. xcvii.*), *s.* 11.

Baily v. *De Crespigny* (1869) L. R. 4 Q. B. 180 distinguished and explained.

Decision of Bennett J. [1931] 2 Ch 145, affirmed. Walton Harvey, Ld. *v.* Walker & Homfrays, Ld.
Bennett J. and C. A. 145, 274

—— Licensed premises—Agreement for sale—Date of completion—"On or about"—Time of essence of contract - **35**
See Vendor and Purchaser **1.**

—— Sale of land—Acceptance of vendor's offer subject to ratification—Withdrawal of offer before ratification **455**
See Vendor and Purchaser **2.**

CORPORATION — *Constituted by Act of Parliament—Power to levy Rates—Power to employ Labour — Gratuitous Payments — Superannuation Fund for retired Employees—Intra vires — Commissioners Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 16), *s.* 65—*Wimbledon and Putney Commons Act,* 1871 (34 *&* 35 *Vict. c. cciv.*), *ss.* 2, 8, 32, 36, 39, 74, 82, 90.

Cyclists' Touring Club v. *Hopkinson* [1910] 1 Ch. 179 followed. Wimbledon and Putney Commons Conservators *v.* Tuely
Bennett J. 190

COSTS—*Taxation—Compromise of Action before Trial—Defendants to pay Plaintiff's Costs as between Solicitor and Client—Costs incurred before Issue of Writ—Costs of third Expert—Discretion of Taxing Master—Rules of Supreme Court, Order* lxv., *r.* 27, *sub-r.* 29.

Pêcheries Ostendaises (Soc. Anon.) v. *Merchants' Marine Insurance Co.* [1928] 1 K. B. 750 applied.

Graigola Merthyr Co., Ld. v. *Swansea Corporation* [1927] W. N. 30 explained.

Decision of Bennett J. reversed. Frankenburg *v.* Famous Lasky Film Service, Ld.
C. A. 428

COVENANT—Covenant to pay rentcharge—Benefit of covenant not running with rentcharge - - - - **1**
See Rentcharge.

—— Lease — Not to part with possession of demised premises or any part thereof — Seven years' licence to erect advertisement hoardings—No breach - - - - **470**
See Landlord and Tenant **1.**

—— *Restrictive Covenant—Houses to be used as private Dwelling-houses—Purchaser with Notice—Change in Character of Neighbourhood—Plaintiffs' Acts and Omissions—Estoppel.*

Chatsworth Estates Co. *v.* Fewell
Farwell J. 224

CROWN—*Petition of Right—Protectorate—Grant of Lands by Company with Rights under Charter—Rights of Grantees—Native Reserves—Grants of Land by Crown—Prerogative of Crown—Orders in Council affecting Lands granted — Legislative or Executive Powers of Crown—Derogation from Grant—Compensation to Grantees—Effect of Act of Parliament on Crown's Prerogative—Foreign Jurisdiction Act,* 1890 (53 *&* 54 *Vict. c.* 37), *ss.* 1, 2, 3, 11 *and* 12.

Campbell v. *Hall* (1774) 1 Cowp. 204 discussed and distinguished. The North Charterland Exploration Co. (1910) Ld. *v.* The King - - **Luxmoore J. 169**

—— Preferential claim—Insolvent estate—Debt due to executor—Retainer—Priority - - - - - **389**
See Administration **1.**

DAMAGES—Agreement for exhibition of electric advertisements on building—Compulsory acquisition and demolition of building - **145, 274**
See Contract.

—— Lease — Covenant to repair — Reversionary lease granted — Breach of covenant to repair before end of original lease—Measure of damages
See Lease **2.** **515**

DEBTS—Assets for payment—Power of appointment—Exercisable by deed with consent of trustees—General power - - - - - **347**
See Power of Appointment.

—— Specific bequest charged with debts and funeral and testamentary expenses—Order of administration of assets - - - - - **443**
See Will **7.**

DEED OF ARRANGEMENT—Debtor indebted to company in liquidation—Proof by liquidator—Debtor surety for advances to company—Set-off—Mutual dealings - - - **85**
See Bankruptcy **1.**

DEROGATION FROM GRANT—Grant of lands in Protectorate by chartered company—Order in Council affecting lands—Rights of grantees **169**
See Crown.

DEVISE—"Free of all duties"—Succession duty payable on death of tenant for life - - - - - **369**
See Will **4.**

DOWRY—Deposit before marriage in joint names of intending spouses—Agreement as to application after marriage—Withdrawals before marriage—Undue influence - - - **289**
See Gift.

ECCLESIASTICAL LAW — *Presentation — Fitness of Clerk—Refusal of Bishop to admit and license—Jurisdiction of Chancery Division—Action against Bishop—Order in Default of Appearance — Form of Order—Refusal of Bishop to obey Order—Notice of Motion to Archbishop of Canterbury—Form of Notice — Common Law Procedure Act,* 1860 (23 *&* 24 *Vict. c.* 126), *ss.* 26, 27.

NOTLEY *v.* BISHOP OF BIRMINGHAM **Maugham J. 529**

ELECTRICITY—*Supply— Account— Arrears — Receiver — Liability — South Wales Electrical Power Distribution Company Act,* 1900 (63 *&* 64 *Vict. c. cclxxxii.*), *s.* 40.

Paterson v. *Gas Light and Coke Co.* [1896] 2 Ch. 476 distinguished. GRANGER *v.* SOUTH WALES ELECTRICAL POWER DISTRIBUTION CO. - - - - - **Bennett J. 551**

ESTATE DUTY—Bequest of pecuniary legacies—Devise of freehold house—Declaration that all legacies should be free of death duties—Incidence of duty - - - - - 447
See WILL 2.

ESTOPPEL—Restrictive covenant against use except as a private dwelling-house—Changed character of neighbourhood—Plaintiffs' acts and omissions - - - - - 224
See COVENANT.

—— Share certificate — Fraudulent issue by director — No authority from company—Rectification of register
See COMPANY 2. 496

EVIDENCE — Taxation — Three experts — Allowance by registrar—Exceptional circumstances - - 428
See COSTS.

EXECUTOR—Right of retainer—Crown debt —Preferential claim—Priority 389
See ADMINISTRATION 1.

EXPERT WITNESSES—Allowance of three experts on taxation—Exceptional circumstances - - - 428
See COSTS.

FORFEITURE—Lease to two joint tenants—Breaches of covenant — Lessor's action for possession—Application for relief by one lessee only - 60
See LANDLORD AND TENANT 2.

FRAUD—Issue of certificate by director and secretary — No authority of the company — Estoppel — Rectification of register - - - 496
See COMPANY 2.

GIFT—Trust for sale—Proceeds to be divided equally between the children of my son A. and my daughter B.—Construction - - - 357
See WILL 2.

GIFT—*continued.*

—— *Undue Influence — Intended Marriage —Dowry deposited before Marriage in joint Names of intended Spouses—Agreement providing for its Application after Marriage—Withdrawals from Account before Marriage—Influence of intended Husband — Married Women and intended Wives.*

Cobbett v. *Brock* (1855) 20 Beav. 524; *Lovesy* v. *Smith* (1880) 15 Ch. D. 655; and *Page* v. *Horne* (1848) 11 Beav. 227 followed.

Howes v. *Bishop* [1909] 2 K. B. 390 distinguished. *In re* LLOYDS BANK, LD. BOMZE AND LEDERMAN *v.* BOMZE **Maugham J. 289**

HEIRLOOMS—Bequest of chattels including books—Manuscript letters inlaid into sheets bound in volumes—Meaning of "book" - - 521
See WILL 1.

HIGH BAILIFF—Notice of bankruptcy petition—Notice not given in time—High bailiff with knowledge of petition - - - - 138
See BANKRUPTCY 2.

INJUNCTION — Motor omnibuses running without licence—Statutory offence —Penalty—Application by Att.-Gen. for injunction - - 121
See LOCAL GOVERNMENT.

INSANITY—Murder of intestate—Intestate's estate—Murderer's right to distributive share—Public policy 546
See INTESTACY.

INSOLVENT ESTATE—Debt due to Crown —Preferential claim — Executor — Retainer—Priority - - 389
See ADMINISTRATION.

INSURANCE—Participation agreements between insurance companies — No stamped policies under agreements —Winding up of one company — Proof by the other - - 47
See COMPANY 4.

INTESTACY—Bequest of residue to seven named persons—Revocation of gift to two of seven persons - 162
See WILL 6.

—— *Murder of Intestate — Intestate's Estate —Murderer's Right to Distributive Share—Statutory Right—Public Policy Rule—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 46.

The views of Fry L.J. in *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147, 157, 158 preferred to those of Joyce J. in *In re Houghton* [1915] 2 Ch. 173, 178.
In re PITTS. COX *v.* KILSBY **Farwell J. 546**

—— Residuary bequest—Failure—General power of appointment—Intention to exercise - - - - 216
See WILL 9.

JURISDICTION—Chancery Division—Order on bishop to admit and license clerk to a benefice—Failure to obey—Writ to Archbishop commanding him to admit a fit person - **529**
See ECCLESIASTICAL LAW.

LAND CLAUSES—Compulsory acquisition and demolition of building—Contract by lessees for exhibition on building of electric advertisements—Damages - - - **145, 274**
See CONTRACT.

LANDLORD AND TENANT—*Lease—Covenants—Not to " part with the possession of the demised premises or any part thereof "—Seven Years' exclusive Licence to erect Advertisement Hoarding against Front Wall.*
STENING *v.* ABRAHAMS - **Farwell J. 470**

—— Lease—Covenant to repair—Reversionary lease granted—Breach of covenant to repair before end of original lease—Measure of damages
See LEASE **2.** **515**

—— Lease—Power to determine if " up to determination " lessees perform the covenants—Notice to determine—Breach at date of notice remedied before its expiry - - - **379**
See LEASE **1.**

2.—— *Two joint Lessees — Breaches of repairing Covenants — Lessor's Action for Possession — Claim by one joint Lessee alone for Relief against Forfeiture — Meaning of " lessee " — Limitation of Amount of Damages—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *ss.* 36, *sub-s.* 1; 146, *sub-s.* 2—*Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.
T. M. FAIRCLOUGH & SONS, LD. *v.* BERLINER
Maugham J. 60

LAPSE—Income of share of residue—Solvent estate—Order of application of assets—Property of deceased undisposed of by will - - - **202**
See ADMINISTRATION **2.**

LAW OF PROPERTY—*Trust for Sale—Other statutory Trusts and Powers—Trustees for Sale — Duty to consult Beneficiaries — Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 26, *sub-s.* 3—*Law of Property (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule.*
In re JONES. JONES *v.* CUSACK-SMITH
Bennett J. 375

2. —— *Will—Settlement—Settled Land—Undivided Shares—Vesting Assent—Statutory Trusts — Settled Land Act,* 1925 (15 *Geo.* 5, *c.* 18), *s.* 36, *sub-ss.* 1, 4; *Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *First Schedule, Part IV., para.* 2.
In re CUGNY'S WILL TRUSTS. SMITH *v.* FREEMAN - - - **Maugham J. 305**

LEASE—*Construction—Power to determine if, " up to determination " of Lease, Lessees perform the Covenants—Condition Precedent—Notice to determine—Breach at Date of Notice not remedied until Expiration of Notice—Validity of Notice.*
Grey v. *Friar* (1854) 4 H. L. C. 565 applied.
SIMONS *v.* ASSOCIATED FURNISHERS, LD.
Clauson J. 379

—— Covenant not to " part with the possession of the demised premises or any part thereof "—Seven years' exclusive licence to erect advertisement hoarding—No breach - **470**
See LANDLORD AND TENANT **1.**

2. —— *Covenant to repair — Partnership Business on Premises—Reversionary Lease granted to Partners—Agreement for Dissolution and for Sale of Assets to Partners—Date for Completion of Sale—Damages then recoverable for Breach of Covenant to repair—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 149 —*Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *s.* 18, *sub-s.* 1.
Joyner v. *Weeks* [1891] 2 Q. B. 31 followed.
TERRONI AND NECCHI *v.* CORSINI
Maugham J. 515

—— Two joint lessees — Breaches of repairing covenants—Lessor's action for possession—Application for relief from forfeiture by one lessee only
See LANDLORD AND TENANT **2.** **60**

LICENSED PREMISES—Agreement for sale —Date for completion—" On or about "—Time of essence of contract
See VENDOR AND PURCHASER **1.** **35**

LICENSING AUTHORITY—Motor omnibuses —Plying for hire without licence—Statutory offence — Penalty — Injunction on application of Att.-Gen.
See LOCAL GOVERNMENT. **121**

LOCAL AUTHORITY—Compulsory acquisition and demolition of building—Effect on lessees' contract to exhibit and maintain on building electric advertisements—Damages **145, 274**
See CONTRACT.

—— *Land acquired under Statute — Plot of Land handed over for " open space "—Erections on Plot—Public User—Plot appropriated to build Tuberculosis Dispensary—Approval of Minister of Health—Action for Injunction to restrain Building —No Dedication or Public Right of Way—Lands " not required for the purposes for which those lands have been acquired "—Absolute Discretion of Local Authority—Manchester Corporation Act,* 1844 (7 *&* 8 *Vict. c. xli.*), *ss.* 88, 94—*Manchester Corporation Act,* 1845 (8 *&* 9 *Vict. c. cxli.*), *s.* 25—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *s.* 175

LOCAL AUTHORITY—*continued.*

—*Public Health Acts (Amendment) Act,* 1907 (7 *Edw.* 7, *c.* 53), *s.* 95.

Folkestone Corporation v. *Brockman* [1914] A. C. 338 followed.

Att.-Gen. v. *Hanwell Urban District Council* [1900] 2 Ch. 377 referred to. ATT.-GEN. *v.* MANCHESTER CORPORATION **Maugham J. 254**

LOCAL GOVERNMENT—Land acquired by local authority under statute—Plot of land handed over for open space—Subsequent appropriation to build tuberculosis dispensary—Lands not required for purposes for which acquired—Discretion of local authority - - - 254
See LOCAL AUTHORITY.

—— *Licensing Authority—Motor Omnibuses—Plying for Hire without Licence—Statutory Offence—Penalty—Whether sole Remedy—Action by Attorney-General—Injunction—Manchester Police Regulation Act,* 1844 (7 *&* 8 *Vict. c. xl.*).

ATT.-GEN. *v.* SHARP - - **C. A. 121**

MARRIED WOMAN—Intended marriage—Dowry deposited before marriage in joint names of intended spouses—Agreement as to application after marriage—Withdrawals before marriage—Undue influence - - 289
See GIFT.

MASTER AND SERVANT—*Weaving Trade—Wages—Deduction for bad work—Term of Contract—Practice of Mill—Lancashire usage—Legality—Truck Act,* 1831 (1 *&* 2 *Will.* 4, *c.* 37), *s.* 3.

Chawner v. *Cummings* (1846) 8 Q. B. 311 and *Hart* v. *Riversdale Mill Co.* [1928] 1 K. B. 176 followed.

Farnsworth v. *Garrard* (1807) 1 Camp. 38; *Mondel* v. *Steel* (1841) 8 M. & W. 858; and *Sharp* v. *Hainsworth* (1862) 3 B. & S. 139 applied.

Ropner & Co. v. *Stoate, Hosegood & Co.* (1905) 92 L. T. 328, 332 applied.

Decision of Farwell J. [1930] 2 Ch. 117 reversed. SAGAR *v.* H. RIDEHALGH & SON, LD. - - - - - - **C. A. 310**

MOTOR OMNIBUSES—Plying for hire without licence—Statutory offence—Penalty—Injunction at suit of Att.-Gen. - - - - - 121
See LOCAL GOVERNMENT.

MUNIMENTS OF TITLE—Acknowledgment for production—Sale by administrator—Letters of administration 511
See VENDOR AND PURCHASER **3.**

MURDER—Intestate murdered—Murderer insane—Murderer's right to distributive share of intestate's estate—Public policy - - - 546
See INTESTACY.

OPEN SPACE—Land acquired by local authority under statute—Land not required for purposes for which acquired—Subsequent appropriations of plot for tuberculosis dispensary—Injunction—Discretion of local authority - - - 254
See LOCAL AUTHORITY.

PARISH—Bequest to Vicar for time being for parochial institutions or purposes—Validity - - - - 197
See CHARITY **1**

PATENT—*Convention Patent—Patentee entitled to Letters Patent protected in Foreign Country—Date of Application for a Grant in Great Britain—Delay in Application owing to War—Letters Patent granted after War—Application by Patentee for Extension—Retrospective Date—"Patentee as such"—Loss or Damage due to War—Patents, Designs, and Trade Marks (Temporary) Rules,* 1914, *r.* 3—*Patents, Designs, and Trade Marks (Temporary Rules) Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 27)—*Patents and Designs Acts,* 1907 *and* 1919 (7 *Edw.* 7, *c.* 29, *and* 9 *&* 10 *Geo.* 5, *c.* 80), *ss.* 13, 18, *sub-s.* 6; 86, 91, 93.

In re WESTERN ELECTRIC CO., LD.'S, PATENT - - - - **Luxmoore J. 68**

PENALTY—Contract of sale—Sum to be paid on failure to complete—Not recoverable - - - - 35
See VENDOR AND PURCHASER **1.**

—— Motor omnibuses—Plying for hire without licence—Statutory offence—Injunction at suit of Att.-Gen. - 121
See LOCAL GOVERNMENT.

POLICY—Participation agreements between insurance companies—No stamped policies - - - - 47
See COMPANY **4.**

POOR LAW—*Officer or Servant—Superannuation—Officer or Servant away on War Service—Employment of Deputy—"Regular" Employment—Poor Law Officers' Superannuation Act,* 1896 (59 *&* 60 *Vict. c.* 50), *ss.* 2, 3, 4, 10, 19.

HAMMOND *v.* LONDON COUNTY COUNCIL **Farwell J. 540**

POWER OF APPOINTMENT—*General Power—Exercisable by Deed with Consent of Trustees—No duty on Trustees to select Persons to Benefit by Exercise of Power—Equitable Assets.*

In re PHILLIPS. LAWRENCE *v.* HUXTABLE **Maugham J. 347**

—— General power—Residuary bequests by donee's will—Failure—Intention to exercise power - - - 216
See WILL **9.**

PREROGATIVE—Exercise by Crown in Protectorate—Order in Council—Grant of lands by chartered company—Subsequent Order in Council affecting the lands—Rights of grantees 169
See Crown.

PRESENTATION—Fitness of clerk—Refusal of bishop to admit and license—Failure to obey order to do so—Writ to Archbishop to admit a fit person - - - - - 529
See Ecclesiastical Law.

PRINCIPAL AND AGENT—*Administration—Agent employed by Executor—Losses due to Employment of Agent—Liability of Executor—Meaning of "wilful default"—Trustee Act*, 1925 (15 *Geo.* 5, *c.* 19), *s.* 23, *sub-ss.* 1, 3; *s.* 30, *sub-s.* 1.

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—— Vendor's offer to sell land—Acceptance by deputation from charity subject to ratification—Offer withdrawn before ratification - - - 455
See Vendor and Purchaser 2.

PRINCIPAL AND SURETY—Surety's deed of arrangement—Debtor indebted to company in liquidation—Proof—Set-off—Mutual dealings - 85
See Bankruptcy 1.

PROLONGATION—American patent—Right to Convention Patent in England—Delay in application owing to war—Patent granted after war—Loss or damage due to war - - 68
See Patent.

PROTECTORATE—Grant of lands by chartered company—Orders in Council affecting lands granted—Derogation from grant - - 169
See Crown.

RECEIVER—Debenture holders' action—Supply of electricity - - 551
See Electricity.

RENTCHARGE—*Covenant to pay—Benefit of Covenant not running with Rentcharge—Absence of Word of Inheritance in Limitation—Intention to create a perpetual Rentcharge—Direct reference to Limitations exhausting the Fee Simple.*

Dictum of Holt C.J. in *Brewster* v. *Kidgill* (1697) 12 Mod. 166, 170 not followed.

Milnes v. *Branch* (1816) 5 M. & S. 411 followed.

Bally v. *Wells* (1769) Wilmot, 341; 3 Wils. 25 distinguished.

RENTCHARGE—*continued.*

Forster v. *Elvet Colliery Co.* [1908] 1 K. B. 629 followed.

Decision of Clauson J. [1930] 2 Ch. 245 affirmed. Grant *v.* Edmondson - **C. A. 1**

REPAIRING COVENANT—Breaches by two joint lessees—Lessor's action for possession—Application for relief from forfeiture by one lessee only
See Landlord and Tenant 2. 60

RESTRICTIVE COVENANT—Houses not to be used except as private dwellings—Change in character of neighbourhood—Plaintiff's acts and omissions—Estoppel - - - 224
See Covenant.

RULES AND ORDERS:—

—— *Patents, Designs and Trade Marks* (*Temporary*) *Rules*, 1914: r. 3: *In re* Western Electric Co., Ld.'s, Patent - **Luxmoore J. 68**

—— *R. S. C., Order* lxv., *r.* 27, *sub-r.* 29: Frankenburg *v.* Famous Lasky Film Service, Ld. - **C. A. 428**

SALE OF LAND—Muniments of title—Statutory acknowledgment for production—Sale by administrator—Letters of administration - 511
See Vendor and Purchaser 3.

SERVICE—High bailiff—Notice of bankruptcy petition—Not effected in time—Independent knowledge of high bailiff - - - - 138
See Bankruptcy 2.

SETTLED LAND—Limitation in undivided shares after death of tenant for life—Vesting assent—Statutory trusts
See Law of Property 2. 305

SHARES—Right of transfer to another member—Private company—Articles of association—Construction - - - - - 234
See Company 1.

SOLICITOR—Administration of estate—Employment by executor—Losses due to employment—Liability of executor—Meaning of "wilful default" - - - - - 572
See Principal and Agent.

SOLVENT ESTATE—Administration—Order of application of assets—Lapsed share of income of residue—Property of deceased undisposed of by will - - - - - 202
See Administration 2.

STAMP—Participation agreements between insurance companies—No stamped policies - - - - - 47
See Company 4.

STATUTES :—

1831.

1 & 2 Will. 4, c. 37 (Truck), s. 3 : Sagar *v.* H. Ridehalgh & Son, Ld. **C. A. 310**

1837.

1 Vict. c. 26 (Wills), ss. 15, 27 : *In re* Vander Byl - **Luxmoore J. 216**

1844.

7 & 8 Vict. c. xl. (Manchester Police) : Att.-Gen. *v.* Sharp - **C. A. 121**

7 & 8 Vict. c. xli. (Manchester Corporation), ss. 88, 94 : Att.-Gen. *v.* Manchester Corporation **Maugham J. 254**

1845.

8 & 9 Vict. c. cxli. (Manchester Corporation), s. 25 : Att.-Gen. *v.* Manchester Corporation - **Maugham J. 254**

1847.

10 & 11 Vict. c. 16 (Commissioners Clauses), s. 65 : Wimbledon and Putney Commons Conservators *v.* Tuely **Bennett J. 190**

1860.

23 & 24 Vict. c. 126 (Common Law Procedure), ss. 26, 27 : Notley *v.* Bishop of Birmingham **Maugham J. 529**

1863.

26 & 27 Vict. c. 118 (Companies Clauses), Part II. : *In re* Windermere District Gas and Water Acts, 1862 to 1928 - **Bennett J. 556**

1871.

34 & 35 Vict. c. cciv. (Wimbledon and Putney Commons), ss. 2, 8, 32, 36, 39, 74, 82, 90 : Wimbledon and Putney Commons Conservators *v.* Tuely - - **Bennett J. 190**

1873.

36 & 37 Vict. c. 66 (Judicature), s. 25, sub-s. 7 : Lock *v.* Bell **Maugham J. 35**

1875.

38 & 39 Vict. c. 55 (Public Health), s. 175 : Att.-Gen. *v.* Manchester Corporation - - **Maugham J. 254**

1890.

53 & 54 Vict. c. 37 (Foreign Jurisdiction), ss. 1, 2, 3, 11, 12 : North Charterland Exploration Co. (1910), Ld. *v.* R. - - - **Luxmoore J. 169**

1891.

54 & 55 Vict. c. 39 (Stamp), ss. 92, 93, 97 : *In re* National Benefit Assurance Co., Ld. - **Maugham J. 47**

STATUTES—*continued.*

54 & 55 Vict. c. ccvii. (Manchester Corporation), s. 18, sub-s. 1 : Walton Harvey, Ld. *v.* Walker & Homfrays, Ld. - - - **C. A. 274**

1894.

57 & 58 Vict. c. 30 (Finance), s. 18 : *In re* Trimble - - **Bennett J. 369**

1896.

59 & 60 Vict. c. 50 (Superannuation), ss. 2, 3, 4, 10, 19 : Hammond *v.* London County Council **Farwell J. 540**

1900.

63 & 64 Vict. c. cclxxxii. (South Wales Electrical Power) : Granger *v.* South Wales Electrical Power Distribution Co. **Bennett J. 551**

1906.

6 Edw. 7, c. 41 (Marine Insurance), s. 84 : *In re* National Benefit Assurance Co., Ld. - - **Maugham J. 47**

1907.

7 Edw. 7, c. 29 (Patents and Designs), ss. 13, 86, 91, 93 : *In re* Western Electric Co., Ld.'s, Patent **Luxmoore J. 68**

7 Edw. 7, c. 53 (Public Health), s. 95 : Att.-Gen. *v.* Manchester Corporation - - **Maugham J. 254**

1910.

10 Edw. 7, c. 8 (Finance), s. 66 : *In re* Hulton - - - **Bennett J. 77**

1914.

4 & 5 Geo. 5, c. 27 (Patents, Designs and Trade Marks) : *In re* Western Electric Co., Ld.'s Patent **Luxmoore J. 68**

4 & 5 Geo. 5, c. 59 (Bankruptcy), s. 31 : *In re* Fenton **Luxmoore J. and C. A. 85**

—— —— s. 33, sub-s. 1 (*a*) : *In re* Cockell **Clauson J. and C. A. 389**

—— —— s. 41, sub-s. 2 : *In re* Harris **Div. Ct. 138**

1918.

8 & 9 Geo. 5, c. 40 (Income Tax), ss. 2, 4, 56 : *In re* Hulton - **Bennett J. 77**

1919.

9 & 10 Geo. 5, c. 85 (Patents and Designs), s. 7, sub-s. 3, s. 19 : *In re* Western Electric Co., Ld.'s, Patent **Luxmoore J. 68**

1920.

10 & 11 Geo. 5, c. xcvii. (Manchester Corporation) : Walton Harvey, Ld. *v.* Walker & Homfrays, Ld. **Bennett J. 145 and C. A. 274**

STATUTES—*continued.*

1925.

15 Geo. 5, c. 18 (Settled Land), s. 36, sub-ss. 1, 4: *In re* Cugny's Will Trusts - - **Maugham J. 305**

15 Geo. 5, c. 19 (Trustee), s. 23, sub-ss. 1, 3; s. 30, sub-s. 1: *In re* Vickery **Maugham J. 572**

15 Geo. 5, c. 20 (Law of Property), s. 26, sub-s. 3: *In re* Jones **Bennett J. 375**

—— —— s. 36, sub-s. 1; s. 146, sub-s. 2: T. M. Fairclough & Sons, Ld. *v.* Berliner - - **Maugham J. 60**

—— —— s. 41: Lock *v.* Bell **Maugham J. 35**

—— —— s. 149: Terroni and Necchi *v.* Corsini - - **Maugham J. 515**

—— —— First Schedule, Part IV., para. 2: *In re* Cugny's Will Trusts **Maugham J. 305**

15 Geo. 5, c. 23 (Administration of Estates), s. 32, sub-s. 1; s. 34, sub-s. 3; Schedule I., Part II., para. 1: *In re* Tong - - - - **C. A. 202**

—— —— ss. 34, 57, Sch. I., Part I.: *In re* Cockell **Clauson J. and C. A. 389**

—— —— s. 34, sub-s. 3, Sch. I., Part II., paras. 2, 3, 4, 8: *In re* Littlewood **Maugham J. 443**

—— —— s. 36: *In re* Miller and Pickersgill's Contract **Clauson J. 511**

—— —— s. 46: *In re* Pitts **Farwell J. 546**

—— —— ss. 46, 50: *In re* Vander Byl **Luxmoore J. 216**

15 & 16 Geo. 5, c. 36 (Finance), s. 24: *In re* Trimble - **Bennett J. 369**

1926.

16 & 17 Geo. 5, c. 11 (Law of Property), Schedule. *In re* Jones **Bennett J. 375**

1927.

17 & 18 Geo. 5, c. 10 (Finance), ss. 38, 42, 47: *In re* Hulton - **Bennett J. 77**

17 & 18 Geo. 5, c. 36 (Landlord and Tenant), s. 18, sub-s. 1: T. M. Fairclough & Sons, Ld. *v.* Berliner - - **Maugham J. 60**

Terroni and Necchi *v.* Corsini **Maugham J. 515**

1928.

18 & 19 Geo. 5, c. 17 (Finance): *In re* Hulton - - - **Bennett J. 77**

STATUTES—*continued.*

1929.

19 & 20 Geo. 5, c. lii. (Windermere Urban Council), ss. 5, 18; *In re* Windermere District Gas and Water Acts, 1862 to 1928 **Bennett J. 558**

STATUTORY COMPANY — Winding up — Rights of preference shareholders—Conditions of certificates—Preferential right of repayment out of surplus assets—No further interest in surplus assets—Validity - **558**
See Company **3.**

STATUTORY TRUSTS—Undivided shares following death of tenant for life—Vesting assent - - - **305**
See Law of Property **2.**

SUCCESSION DUTY—Devise "free of all duties"—Duty payable on death of tenant for life not included - **369**
See Will **4.**

SUPERANNUATION—Fund for retired employees—Corporation constituted by Act of Parliament—Power to levy rates and employ labour—Creation of fund intra vires - - **190**
See Corporation.

—— Officer or servant—Part of service as deputy for gate keeper on war service—Regular employment **540**
See Poor Law.

SUPPLY OF ELECTRICITY—Company—Sum owing for electricity supplied—Receiver for debenture holders—Right to supply - - - **551**
See Electricity.

SURTAX—Bequest of annuity free of income tax and super tax—Annuity payable free of surtax - - **77**
See Will **5.**

TAXATION—Costs incurred before issue of writ—Compromise of action—Discretion of taxing master - **428**
See Costs.

TRUSTEES FOR SALE—Statutory trusts and powers—Duty to consult beneficiaries before exercise - **375**
See Law of Property **1.**

ULTRA VIRES—Corporation constituted by Act of Parliament—Power to levy rates and employ labour—Creation of superannuation fund—Not ultra vires - - - - - **190**
See Corporation.

UNDIVIDED SHARES — Settled land — Death of tenant for life — Vesting assent—Statutory trusts - **305**
See Law of Property **2.**

UNDUE INFLUENCE—Intending spouses—Dowry deposited before marriage in joint names — Agreement as to application after marriage — Withdrawals before marriage - 289
See Gift.

VENDOR AND PURCHASER—*Contract for Sale of Interest in licensed Premises—Completion "on or about"—Construction of Contract in Law and in Equity in regard to Time—Time of the Essence of the Contract—Supreme Court of Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 7—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 41.

Coslake v. *Till* (1826) 1 Russ. 376; *Tilley* v. *Thomas* (1867) L. R. 3 Ch. 61; *Stickney* v. *Keeble* [1915] A. C. 386; and *Bradley* v. *Walsh* (1903) 88 L. T. 737 followed. Lock *v.* Bell - **Maugham J. 35**

—— Devise and bequest to sons of freeholds and business charged with payment of annuity—Sons appointed executors—Sale to company—No mention of annuity in conveyance—Company's undertaking to pay annuity—Sale by company of part of freeholds—Liability of purchaser to pay annuity—Notice - - 475
See Will 3.

2. —— *Letter from Vendor to Secretary to Charity stating Price of Property—Interview between Deputation from Board of Management and Vendor—Acceptance at Interview of Vendor's Offer subject to Ratification—Negotiations broken off by Vendor before Ratification — Acceptance by Agent subject to Ratification by Principal.*

Bolton Partners v. *Lambert* (1889) 41 Ch. D. 295 discussed and distinguished. Watson *v.* Davies - **Maugham J. 455**

3. —— *Muniments of Title — Statutory Acknowledgment for Production — Sale by Administrator — Letters of Administration — Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 36.

In re Miller and Pickersgill's Contract **Clauson J. 511**

WAGES — Weaving trade — Deduction for bad work—Term of contract — Practice of mill — Usage — Legality - - - - 310
See Master and Servant.

WAR—American patent—Patentee entitled to Convention patent in England—Delay in application owing to War —Letters patent granted after War —Prolongation—Loss or damage due to War - - - - 68
See Patent.

WEAVING TRADE—Deduction from wages for bad work — Term of contract—Practice of mill—Usage—Legality
See Master and Servant. 310

WILL.

I. Construction.

Bequest of Chattels including "books" as Heirlooms — Manuscript Letters inlaid into Sheets bound in Volumes — Meaning of "book."

In re Plowden (1908) 24 Times L. R. 883; *Willis* v. *Curtois* (1838) 1 Beav. 189: and *In re Barratt* (1915) 31 Times L. R. 502 followed.

In re Masson (1917) 86 L. J. (Ch.) 753 distinguished.

In re Baroness Zouche [1919] 2 Ch. 178 considered.

In re Tomline's Will Trusts. Pretyman *v.* Pretyman - - **Maugham J. 521**

2. —— *Codicil—Gift—Trust for Sale—Proceeds to be divided "equally between the children of my son A. and my daughter B."*

In re Dale. Mayer *v.* Wood **Luxmoore J. 357**

3. —— *Devise and Bequest of Freeholds and Business by Testator to his Sons beneficially subject to Payment of Annuity to Widow—Sons appointed Executors—Sale of Freeholds and Business to Company—by Sons "as beneficial owners"—No Mention of Annuity in Conveyance—Undertaking by Company by separate Deed to satisfy Annuity —Sale by Company of Part of Freeholds—Purchaser, whether put upon Inquiry as to Charge of Annuity by Terms of Conveyance—Notice to Purchaser of Facts in Memorandum and Articles and Execution of Conveyance by Company—Debentures issued by Company—Company unable to pay Annuity—Liability of Company and Debenture Holders.*

Corser v. *Cartwright* (1875) L. R. 7 H. L. 731 and *In re Henson* [1908] 2 Ch. 356 followed.

Parker *v.* Judkin **Maugham J. and C. A. 475**

4. —— *Devise of Premises "free of all duties" to A. for life, with remainder over—Succession payable on Death of Tenant for Life — Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *s.* 18—*Finance Act,* 1925 (15 & 16 *Geo.* 5, *c.* 36), *s.* 24.

In re Trimble. Wilson *v.* Turton **Bennett J. 369**

5. —— *Gift of Annuity free of Super Tax — Surtax — Finance* (1909–10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 66—*Income Tax Act,* 1918 (8 & 9 *Geo.* 5, *c.* 40), *ss.* 2, 4, 56—*Finance Act,* 1927 (17 & 18 *Geo.* 5, *c.* 10), *ss.* 38, 42, 47—*Finance Act,* 1928 (18 & 19 *Geo.* 5, *c.* 17).

In re Bowring (1918) 34 Times L. R. 575 applied. *In re* Hulton. Hulton *v.* Midland Bank Executor and Trustee Co., Ld. **Bennett J. 77**

6. —— *Gift of Residue between several named Legatees—Revocation by Codicil of*

WILL—*continued.*

Gift to two of the residuary Legatees—Confirmation of Will as modified by Codicil—Intestacy.

The principle of *Sykes* v. *Sykes* (1868) L. R. 3 Ch. 301 applied.
In re Whiting [1913] 2 Ch. 1 doubted.
In re FORREST. CARR *v.* FORREST
Clauson J. 162

7. —— *Specific Bequests charged with Debts and Funeral and Testamentary Expenses—Gift of Residue—Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 34, *sub-s.* 3; *Schedule I., Part II., paras.* 2, 3, 4, 8.

In re Kempthorne [1930] 1 Ch. 268 and *In re Atkinson* [1930] 1 Ch. 47 followed.
In re Smith [1913] 2 Ch. 216 referred to.
In re LITTLEWOOD. CLARK *v.* LITTLEWOOD
Maugham J. 443

8. —— *Statutory Will Forms,* 1925—*Bequest for pecuniary Legacies—Devise of Freehold House—Gift of all Legacies free from all Death Duties — Residuary Devise and Bequest—Incidence of Estate Duty—Whether borne by Residue or by Freehold House.*

In re PREVITÈ. STURGES *v.* PREVITÈ
Luxmoore J. 447

II. MISCELLANEOUS.

9. —— *Settlement of Residuary Gift—Power of Appointment—Trust for Next of Kin in Default of Appointment—Will of Donee of Power—Residuary Bequest—Failure of Gift—Husband of Residuary Legatee witnessing Will—Exercise of Power—Intention of Donee of Power—Blended Fund—Statutes of Distribution—Wills Act,* 1837 (7 *Will.* 4 *&* 1 *Vict. c.* 26), *ss.* 15, 27—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *ss.* 46, 50.

In re Davies' Trusts (1871) L. R. 13 Eq. 163 discussed and distinguished. *In re* VANDER BYL. FLADGATE *v.* GORE
Luxmoore J. 216

WINDING UP—Statutory company—Rights of preference shareholders—Conditions of certificates — Preferential repayment out of surplus assets—No further interest in surplus assets—Validity - - - - 558
See COMPANY 2.

WORDS :—

—— "Articles of vertu": *In re* TOMLINE'S WILL TRUSTS - **Maugham J. 521**

—— "Book": *In re* TOMLINE'S WILL TRUSTS **Maugham J. 521**

—— "Free of all duties": *In re* TRIMBLE **Bennett J. 369**

—— "Lessee": T. M. FAIRCLOUGH & SONS, LD. *v.* BERLINER **Maugham J. 60**

—— "Patentee as such": *In re* WESTERN ELECTRIC CO., LD.'S, PATENT **Luxmoore J. 68**

—— "Person": GRANGER *v.* SOUTH WALES ELECTRICAL POWER DISTRIBUTION CO. - - - **Bennett J. 551**

—— "Property of deceased undisposed of by will": *In re* TONG - - **C. A. 202**

—— "Real and personal estate": *In re* TONG - - - - **C. A. 202**

—— "Reversion": TERRONI AND NECCHI *v.* CORSINI - - **Maugham J. 515**

—— "Wilful default": *In re* VICKERY **Maugham J. 572**

WORDS OF INHERITANCE—Absence in grant of rentcharge—Intention to create perpetual rentcharge—Direct reference to limitations exhausting the fee simple - - - - 1
See RENTCHARGE.

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TABLE OF CASES.

CHANCERY DIVISION.

		PAGE
Attorney-General *v.* Sharp	C. A.	121
Fairclough (T. M.) and Sons, Ld. *v.* Berliner		60
Fenton, *In re.* *Ex parte* Fenton Textile Association	C. A.	85
Forrest, *In re.* Carr *v.* Forrest		162
Grant *v.* Edmondson	C. A.	1
Harris, *In re*		138
Hulton, *In re.* Hulton *v.* Midland Bank Executor and Trustee Co.		77
Lock *v.* Bell		35
National Benefit Assurance Co., *In re*		46
North Charterland Exploration Co. (1910), Ld. *v.* The King		169
Walton Harvey, Ld. *v.* Walker and Homfrays, Ld.		145
Western Electric Co., Ld.'s Patent, *In re*		68
Wimbledon and Putney Commons Conservators *v.* Tuely		190

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